(26,749)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 663.

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,

vs.

MARY L. HOTCHKISS, EVA A. WOODWORTH, AND MARGARET A. SMALLEY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

INDEX.

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., January 15, 1919.

a In the United States Circuit Court of Appeals, Sixth Circuit.

No. —.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

EVA A. WOODWORTH, MARY L. HOTCHKISS, and MARGARET A. SMALLEY, Defendants in Error.

Error to the District Court of the United States for the Eastern District of Michigan, Northern Division.

TRANSCRIPT OF RECORD.

Thomas A. E. Weadock, Detroit, Michigan, Attorney for Plaintiff in Error.
Edward S. Clark, Bay City, Michigan, Attorney for Defendants in Error.

1 *Declaration of Margaret A. Smalley.*

(Transferred May 4, 1909.)

STATE OF MICHIGAN:

In the Circuit Court for the County of Bay.

COUNTY OF BAY, *ss*:

Margaret A. Smalley, of Bay City, Michigan, plaintiff herein, by Gillett & Clark and John C. Weadock, her attorneys, complains of Joseph W. McGraw, of Bay City, Michigan, and Frank P. Chesbrough, of Detroit, Michigan, defendants herein, said defendants having been duly summoned to answer the said plaintiff of a plea of trespass on the case.

First Count. For that, whereas, heretofore, to wit, on the 16th day of December, 1903, and for, to wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the act of congress of June 3, 1864, and amendments thereto, known as the National Banking Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the County and State aforesaid.

And whereas, the act of Congress aforesaid being Section 5211 of the Compilation aforesaid, then and there provided for the making and publication by the said bank of reports exhibiting in detail and

under appropriate heads the resources and liabilities of the
2 said bank upon certain dates specified by the Comptroller of
the Currency, and required the truth of said reports to be attested by at least three of the directors of said bank.

And whereas by necessary implication the said act of Congress then and there required that such reports, when made and published, should contain a true statement of the condition of said bank, and the value of its resources, including its loans and discounts, and of the amount of its surplus and undivided profits, so as to enable plaintiff as one of the public for whose information said reports were published to ascertain therefrom the value of its resources and of its capital stock, and whereas by like implication said act of Congress prohibited the making and publishing of a false report.

And whereas, the said act of Congress aforesaid, being Section 5239 of the compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

And whereas, the Comptroller of the Currency had then and there specified the 17th day of November, 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that it was then and there the duty of said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents, or servants of said bank to violate and not to participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendants and each of them disregarding their duty on, to wit, the 21st day of November, 1903, to wit, the 24th day of November, 1903, at, to wit, the city of Bay City, aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by signing, attesting, and permitting and assenting to the publication
of a false report of the resources and liabilities of the said
3 bank and its condition at the close of business on November
17th, 1903, which said report was in the words and figures following, to wit:

Report of the Condition of the Old Second National Bank at Bay City, in the State of Michigan, at the Close of Business November 17th, 1903:

Resources.

Loans and discounts		$1,081,446.05
Overdrafts secured and unsecured		1.39
U. S. bonds to secure circulation		200,000.00
Stocks, securities, etc.		66,963.98
Banking house furniture and fixtures		2,500.00
Due from national banks (not reserve agents)		902.18
Due from state banks and bankers		9,570.95
Due from approved reserve agents		83,891.37
Checks and other cash items		462.53
Exchanges for clearing house		5,969.71
Notes of other national banks		7,965.00
Fractional paper currency, nickels and cents		528.78
Lawful money reserve in bank viz:		
Specie	$40,715.00	
Legal tender notes	15,630.00	
		56,345.00
Redemption fund with U. S. treasurer 5 per cent of circulation		10,000.00
Total		$1,526,536.93

Liabilities.

Capital stock paid in		$200,000.00
Surplus fund		75,000.00
Undivided profits less expense and taxes paid		40,733.26
National bank notes outstanding		200,000.00
Due to other national banks		13,386.77
Due to state banks and bankers		42,837.80
Individual deposits subject to check	$400,837.54	
Demand certificates of deposit	503,701.56	
		904,539.10
Bills payable, including certificates of deposit for money borrowed		50,000.00
Total		$1,526,536.93

4 STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 21st day of November, 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:
FRANK P. CHESBROUGH,
J. W. McGRAW,
E. B. FOSS,
Directors.

And plaintiff says that said report was printed and circulated on the 22nd and 24th days of November, 1903, in the Bay City Tribune, and on the 23rd day of November, 1903, in the Bay City Times, both of which were public newspapers printed and circulated in the city of Bay City aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of $1,081,446.05, leaving an unimpaired capital, a surplus fund of $75,000 and undivided profits, less expenses and taxes paid, of $40,733.26, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face value and less than, to-wit, $800,000, and the said item of loans and discounts included, and was known by the said defendants and each of them to include commercial paper listed at or above the face value, and known to be worth much less, to wit, $200,000 less than its face value, thus materially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this, to wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to wit, upwards of one-half of its capital.

5 And plaintiff says that, acting through her agent, Frank T. Woodworth, relying upon the truth of said report, and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter, to wit, on the 16th day of December, 1903, purchased, to wit, ten shares of the capital stock of said bank of the par value of, to wit, one thousand dollars, and paid therefor the sum of $1,450, that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value, to plaintiff's damage of three thousand dollars, and therefore she brings suit.

Second Count. Also for that, whereas, heretofore, to wit, on the 16th day of December, 1903, and for, to wit, ten years prior thereto defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the Act of Congress of June 3, 1864, and amendments thereto known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the county and state aforesaid.

And whereas, the Acts of Congress aforesaid, being Sections 5199 and 5204 of the compilation aforesaid, provided that dividends declared upon the capital stock of any national banking association should be declared out of the net profits thereof, and that neither any such association nor any of its members should withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital, and that if losses had at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend should be made.

And whereas it was thereby further provided that no dividend should ever be made by any such association while it continued its banking operations to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts.

And whereas, the said Act of Congress, aforesaid, being Section 5239 of the compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

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And whereas, the defendants and each of them then and there knew that the payment of dividends on the stock of said bank would be understood and accepted by all persons contemplating business transactions in regard to the stock of said bank, as an assurance and representation that the capital of said bank was unimpaired and that the said stock was worth its par value and upwards and that no losses had been sustained equal to or exceeding its undivided profits then on hand, and that its net profits then on hand, after deducting therefrom its losses and bad debts, equalled or exceeded the sums so declared as dividends.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the said bank to violate, and not to participate in or assent to such violation of any of the provisions of the acts of Congress aforesaid in respect to the declaration of dividends, as aforesaid.

And plaintiff says that the said defendants and each of them disregarding their said duty on, to wit, the 27th day of November, 1903, to wit, the first day of December, 1903, at, to wit, the city of Bay City, aforesaid, knowingly violated and knowingly participated in, permitted and assented to the violation of the provisions of the acts of congress aforesaid in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on, to wit, December 1st, 1903, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had theretofore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared

as dividends exceeded its net profits then on hand, after deducting therefrom its losses and bad debts.

And plaintiff says that, acting through her agent, Frank T. Woodworth, relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting
7 therefrom its losses and bad debts, and that losses had not been sustained by said bank exceeding its undivided profits; plaintiff thereafter on, to wit, December 16th, 1903, purchased, to wit, ten shares of the capital stock of said bank of the par value of one thousand dollars, paying therefor the sum of, to wit, $1,450, which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by defendants of the provisions of said Act of Congress aforesaid plaintiff sustained damages in the sum of three thousand dollars, and therefore she brings suit.

Third Count. Also for that, whereas, heretofore, to wit, on the 16th day of December, 1903, and for, to wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the county and state aforesaid.

And whereas, the act of Congress aforesaid being Section 5200 of the compilation aforesaid, then and there provided that the total liabilities to the bank of any person, company, corporation or firm for money borrowed (not including the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same) should at no time exceed one-tenth part of the amount of the capital stock of said bank actually paid in.

And whereas, the capital stock of the said bank actually paid in was then and there the sum of $200,000.

And whereas, the defendants and each of them then and there knew that the creation and continuation of liabilities in violation of the section aforesaid and the carrying of the same among the loans and discounts of the said bank would mislead and deceive the plaintiff as a member of the public, and would cause the published reports of said bank to present to the plaintiff as a member of the public a false and misleading representation in regard
8 to the nature and value of said loans and discounts, and that plaintiff as a member of the public had the right to rely upon the belief that the loans and discounts of said bank contained no liabilities which were created or permitted to continue in knowing violation of the section aforesaid.

And plaintiff says it was then and there the duty of the said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate and not to participate in or assent to such violation of any of the provisions of the section last aforesaid.

And plaintiff says that the defendants and each of them at, to wit, the time and place aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the said section in this, to wit, that they knowingly participated in, permitted and assented to the creation of certain liabilities to the said bank in violation of the section aforesaid, and knowingly permitted and assented to the continuance of the said liabilities and the carrying of the same among the loans and discounts of the said bank after defendants and each of them had knowledge of the nature and character of the liabilities aforesaid, and that they had been created and were being carried in violation of the section aforesaid. And plaintiff says that the liabilities aforesaid were as follows, to wit, of one Alzina Maltby, to-wit, of one Alvin Maltby, doing business as the Maltby Lumber Company, of Bay City, Michigan, the sum of towit, $200,000, and of Willard I. Brotherton, Henry N. Watrous, and Henry W. Jennison, copartners, doing business under the firm name of W. I. Brotherton & Company, of Bay City, Michigan, the sum of, to wit, $50,000, said liabilities being in excess of and not consisting of or created by the discount of bills of exchange drawn in good faith against actually existing values or the discount of commercial or business paper actually owned by the person negotiating the same. And plaintiff says that the said Alzina Maltby, Alvin Maltby and the said Willard I. Brotherton, and others, doing business as W. I. Brotherton & Company, were on, to wit, the first day of January, 1903, and thereafter insolvent, and that by reason of the violation of the section aforesaid, the said bank then and thereafter during the entire year 1903 carried among its loans and discounts liabilities of the said Alzina Maltby, Alvin Maltby and
9 of the said W. I. Brotherton & Co., of the face value of, to wit, $200,000, which were then and there of no value and were thereafter charged off to profit and loss upon the books of said bank. That by reason of the promises and in consequence of the concurrent violation by the defendants of the section aforesaid, in the manner aforesaid, the published reports of the said bank during the entire year 1903 presented to the public, including this plaintiff, false and misleading representations in regard to the condition of the said bank, the value of its resources, the amount of its surplus and undivided profits and the value of its capital stock.

And plaintiff says that, acting through her agent, Frank T. Woodworth, in reliance upon the belief that the loans and discounts of said bank as listed in its published reports during the year 1903 included no liabilities knowingly created or knowingly permitted to continue in violation of the section aforesaid, plaintiff, on, to wit, December 16th, 1903, purchased, to wit, ten shares of the

capital stock of the said bank of the par value, to wit, one thousand dollars, and paid therefor the sum of, to wit, $1,450, which would have been the fair and reasonable value thereof if the said defendants had not violated the section aforesaid in the manner aforesaid, but which said stock was in fact of no value by reason whereof and in consequence of the concurrent violation of defendants of the section aforesaid, in the manner aforesaid, plaintiff suffered damages in the sum of three thousand dollars, and therefore she brings suit.

Fourth Count. Also, for that, whereas, defendants heretofore, to-wit, on the 16th day of December, 1903, and for, to-wit, ten years prior thereto, at Bay City in said county, were directors of the Old Second National Bank, a national banking corporation, and were charged with and subject to certain duties and liabilities under Sections 5199, 5200, 5304, 5211 and 5239 of Title 62, of the United States Compiled Statutes of the Compilation of 1901, as is fully and particularly referred to and described in the preceding counts of this declaration, which said counts are hereby referred to and made a part of this count.

And plaintiff says that the said defendants, acting jointly and concurrently, knowingly violated and knowingly participated in, permitted and assented to the violation of the several provi-
10 sions of the acts of Congress aforesaid in the several ways and under the several circumstances set forth in the preceding counts of this declaration, which are hereby made a part of this count, and that defendants, acting as aforesaid, also knowingly violated and knowingly participated in, permitted and assented to the violation of the several provisions of the acts of Congress aforesaid, by signing, attesting and permitting and assenting to the publication of certain other false reports of the resources and liabilities of said bank at certain other dates during said year 1903, to wit, April 9th, 1903, June 9th, 1903, and September 9th, 1903, and also by declaring and permitting or assenting to the declaration on, to wit, May 29th, 1903, of a semi-annual dividend of five per cent, payable on, to wit, June 1st, 1903, all of said violations and permitted violations being portions of a general design and conspiracy on the part of the said defendants to deceive the public, including this plaintiff, for the purpose of giving the stock of said bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the said stock, then and there held by them, at a price exceeding their true value.

And plaintiff says that acting through her agent, Frank T. Woodworth, she was deceived and misled by and relied upon the acts and omissions of the defendants as aforesaid, by reason whereof and in consequence of the violation by defendants of the acts of Congress aforesaid, plaintiff on, to wit, December 16th, 1903, purchased, to wit, ten shares of the capital stock of said bank of the par value of, to wit, one thousand dollars and paid therefor the sum of, to wit, $1,450, which said sum was the apparent value thereof and would have been the true value thereof if it had not been for the violation by the defendants of the acts of Congress aforesaid, but which

said stock was in fact of no value, to plaintiff's damage of three thousand dollars, and therefore she brings suit.

GILLETT & CLARK,

Business address, Shearer Bldg., Bay City, Mich.;

JOHN C. WEADOCK,
Attorneys for Plaintiff.

Business address, 7 Wall Street, New York City.

11 *Plea and Notice of Defendant Chesbrough.*

(Filed Jan. 2, 1913.)

The defendant, Frank P. Chesbrough, by Thomas A. E. Weadock, his attorney, demands a trial of the matters set forth in plaintiff's declarations.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

To Gillett & Clark, Attorneys for Plaintiffs.

SIRS: Please take notice that the defendant, Frank P. Chesbrough, will, on the trial of this case, insist and give in evidence, under the general issue above pleaded, that the Second National Bank of Bay City, referred to in plaintiff's declaration, was organized and had its existence under and by virtue of the National Banking Act, passed and approved by the Congress of the United States, being Secs. 5133, et seq. of the revised statutes of the United States. Said plaintiff was represented in all things relating to the purchase of said stock in the Old Second National Bank by Frank T. Woodworth, her agent, and that his knowledge is her knowledge in relation to the matters in question.

That Orrin Bump, James Davidson, and his successor, James E. Davidson, were respectively the presidents of said bank, and that Orrin Bump and Martin M. Andrews were respectively the cashiers of said bank during the period in question; that said bank
12 was managed by a board of seven directors; that each of the defendants herein was a director of said bank, and that the aforesaid Orrin Bump departed this life on the 4th day of October, 1907.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency of the United States or adjudged by any court, for the reason of the violation of any of the provisions of the National Banking Act by the directors and officers of said bank, or for any other reason. That said bank has done business at Bay City continuously since its organization, and is still doing business there.

This defendant denies that he knowingly signed or attested any false or incorrect report set out and referred to in the said declaration, and denies that he made, signed or attested any report purport-

ing to show the condition of said bank for the purpose and in the manner alleged in the plaintiff's declaration.

That said Frank T. Woodworth, agent for said plaintiff, was employed for years prior to his purchase of stock in the Second National Bank at Bay City, described in said declaration, and was entirely familiar with the manner in said bank of making reports to the Comptroller of the Currency, and knew that the directors who signed said reports from time to time relied upon the statements on oath of the cashier that he believed said statements were correct, and other officers of the bank who prepared said statements, that they were correct. That he also knew that the condition of the bank, as shown by its books, on a designated past day, was asked for by the comptroller.

That said defendant in this cause relied on the oaths of the cashier of the bank, Martin M. Andrews, and the honesty, ability and integrity of the officers, agents and employes of said bank, and without any knowledge of anything to the contrary, signed the statements in good faith, believing them to be correct, as the said Frank T. Woodworth, agent for said plaintiff, afterwards signed the statements of the condition of said bank on January 11th and May 29th, 1905, to said comptroller, when he was a director of said bank.

That said Frank T. Woodworth, agent for said plaintiff, purchased the stock mentioned in his declaration of brokers, at his own instance and for the purpose of acquiring with other parties,
13 viz., directors of the First National Bank, a majority of the stock of said bank by himself and other parties acting with him, in order to get control of the majority of the stock of said bank, and thereby procure his election to the board of directors and to the presidency of said bank, and to secure a consolidation of said banks.

That said Frank T. Woodworth, agent for said plaintiff, was employed in said bank as collection clerk for about two and one-half years, and was then check and deposit bookkeeper for the remainder of the time he was in said bank prior to 1885; that in his business career he was a member of the firms of Slater & Woodworth and Smalley & Company, in which he was a partner, and later Smalleys & Woodworth, which firm was formed in 1890, and lasted until 1897, after which the firm was known as Woodworth & Company, all of which firms kept their accounts, discounted their paper and did all their banking business at said Second National Bank, and knew that said Smalleys & Woodworth made a compromise with said Bank by which it lost money.

That said Frank T. Woodworth, agent for said plaintiff, kept his own account and the accounts of the different firms in which he was interested from time to time for the past twenty-five years continuously in the said bank, and knew the general history of the same, and knew of the losses sustained by the said bank in the Mosher failure in 1895, and on the notes and bills mentioned in his bill of particulars, and he had this knowledge long before he purchased any of the stock of said bank mentioned in his declaration. That he also knew that said bank had a large amount of Alvin Maltby's paper at the time and before the time said stock was purchased.

That for thirty years continuously prior to January 1st, 1903, said Frank T. Woodworth, agent for said plaintiff, resided in Bay City, and was personally acquainted with the officers and employes of said Second National Bank; that he knew they were men of integrity and high character, and one of them was his near relative, and another a relative of his wife, and all of them were his near neighbors and daily associates; that in purchasing the stock of said bank he relied upon his own knowledge of the condition of said bank, and of the men who then composed its board of directors, and
14 who were its executive officers, and he did not rely upon the printed statements set up in her declaration, nor any of them.

That said Frank T. Woodworth's father-in-law, James S. Smalley, who lived in his family, had been a stockholder in said bank and received dividends therefrom three or four years before he bought stock therein. That in October, 1904, said Frank T. Woodworth, agent for said plaintiff, was appointed a member of an investigating committee to look into the affairs of said bank, and acted as such, after which, as a director of said bank, he attested as correct by signing his name thereto the statement of said bank to the Comptroller of the Currency made January 17th, 1905, which was duly published, at which time said Frank T. Woodworth, agent for said plaintiff, knew that said bank held said Maltby paper, then changed to paper of Maltby Cedar Co., a corporation formed and controlled by said bank, to the amount of $276,000, which he knew had not been charged off and which amount he also knew was included in the item of "loans and discounts" in said reports at which time said bank held all the paper mentioned in plaintiff's declaration and bill of particulars.

That on or about May 29th, 1905, said Frank T. Woodworth, agent for said plaintiff, attested as correct, by his signature as a director, the report of said bank to the Comptroller of the Currency, which was also duly published, which report, in the item of "loans and discounts" contained, as he well knew, the paper of Maltby & Co., Alzina Maltby and Maltby Cedar Company, referred to in her declaration.

That in 1903, before Frank T. Woodworth, agent for said plaintiff, purchased any stock in said bank, he knew that the items of "loans and discounts" in the report to the Comptroller of the Currency contained good and bad paper, and knew that all the obligations said bank held were included in "loans and discounts," as the law and the Comptroller of the Currency required.

That he knew about the business career of Alvin Maltby for fifteen years prior to the time that he purchased any stock in said bank, and knew that he was connected with the Mosher failure as a member of the firm of Mosher & Maltby, and that all of that time he, said Maltby, had done business at the Second National Bank,
15 which held a large amount of his paper at the time said Frank T. Woodworth purchased the stock in the Old Second National Bank.

THOMAS A. E. WEADOCK,
Attorney for Defendant Frank P. Chesbrough.

Dated Dec. 24th, 1912.

Declaration of Mary L. Hotchkiss.

(Filed March 22, 1909.)

Mary L. Hotchkiss, of Chicago, Illinois, plaintiff herein, by Gillett & Clark and John C. Weadock, her attorneys, complains of Joseph W. McGraw, of Bay City, Michigan, and Frank P. Chesbrough, of Detroit, Michigan, defendants herein, said defendants having been duly summoned to answer the said plaintiff, of a plea of trespass on the case.

First Count. For that whereas, heretofore, to wit, on the 30th day of October, 1903 and for, to wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the Act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being Title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the district and division aforesaid.

And whereas, the Act of Congress aforesaid, being Section 5211 of the compilation aforesaid, then and there provided for the
16 making and publication by the said bank of reports exhibiting in detail and under appropriate heads the resources and liabilities of the said bank upon certain dates specified by the Comptroller of the Currency, and required the truth of said reports to be attested by at least three of the directors of said bank.

And whereas, by necessary implication the said Act of Congress then and there required that such reports, when made and published, should contain a true statement of the condition of said bank, and the value of its resources, including its loans and discounts and of the amount of its surplus and undivided profits, so as to enable plaintiff, as one of the public for whose information said reports were published to ascertain therefrom the value of its resources and of its capital stock, and whereas, by like implication said Act of Congress prohibited the making and publishing of a false report.

And whereas, the said act of Congress, aforesaid, being Section 5239 of the compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

And whereas, the Comptroller of the Currency had then and there specified the 9th day of September, 1903, and had made requisition upon the said bank for a report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that it was then and there the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and

not to participate in or assent to the violation of any of the provisions of the act of Congress aforesaid.

And plaintiff says that the defendant McGraw, disregarding his said duty on, to wit, the 12th day of September, 1903, to wit, the 14th day of September, 1903, at, to wit, the city of Bay City, aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the fact of Congress aforesaid by signing, attesting and permitting and
17 assenting to the publication of a false report of the resources and liabilities of the said bank and of its condition at the close of business on September 9th, 1903, and that the said defendant Chesbrough, disregarding his said duty, then and there knowingly violated and knowingly permitted and assented to the violation of the provisions of the act of Congress aforesaid by permitting and assenting to the signing, attesting and publication of said report; which said report was in the words and figures following, to wit:

Report of the Condition of the Old Second National Bank at Bay City in the State of Michigan, at the Close of Business September 9th, 1903.

Resources.

Loans and discounts		$937,490.77
Overdrafts secured and unsecured		2,428.87
U. S. bonds to secure circulation		200,000.00
Stocks, securities, etc.		46,953.98
Banking house furniture and fixtures		2,500.00
Due from state banks and bankers		15,081.17
Due from approved Reserve agents		159,621.14
Checks and other cash items		202.59
Exchanges for clearing house		11,532.03
Notes of other national banks		7,460.00
Fractional paper currency, nickels and cents		398.83
Lawful money reserve in bank, viz:		
Specie	$44,093.00	
Legal tender notes	8,695.00	
		52,788.00
Redemption fund with U. S. treasurer, 5 per cent of circulation		10,000.00
Total		$1,446,457.38

Liabilities.

Capital stock paid in		$200,000.00
Surplus fund		75,000.00
Undivided profits, less expenses and taxes paid		34,530.20
National bank notes outstanding		200,000.00
Due to other national banks		12,604.53
Due to state banks and bankers		46,173.36
18 Dividends unpaid		10.00
Individual deposits subject to check	$380,554.16	
Demand certificates of deposit	497,585.13	
		878,139.29
Total		$1,446,457.38

STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 12th day of September, 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:
FREMONT B. CHESBROUGH,
J. W. McGRAW,
JAMES DAVIDSON,
Directors.

And plaintiff says that said report was printed and circulated on the 13th, 15th and 16th days of September, 1903, in the Bay City Tribune, a public newspaper printed and circulated in the city of Bay City, aforesaid, and on the 14th and 15th days of September, 1903, in the Bay City Times, a public newspaper printed and circulated in the city of Bay City, aforesaid, the said report as printed in the Bay City Tribune of September 16th, 1903, purporting to have been attested by defendant Frank P. Chesbrough instead of Fremont B. Chesbrough.

And plaintiff says that the said report was knowingly false in this, to wit, that certain loans and discounts of said bank were listed in said report as of the value of $937,490.77, leaving an unimpaired capital, a surplus fund of $75,000 and undivided profits less expenses and taxes paid of $34,530.20, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face

alue and less than, to wit, $750,000; and the said item of loans and iscounts included, and was known by the said defendants and each f them to include commercial paper listed at or above its face value nd known to be worth much less, to wit, $200,000 less than its face alue, thus materially affecting the value of the stock of said bank.

And plaintiff says that the said report was knowingly false also in this, to wit, that the said bank had in fact no surplus fund and no undivided profits, and had lost a large part, to it, upwards of one-half of its capital.

And plaintiff says that, acting through her agent Frank T. Woodworth, relying upon the truth of said report, and in consequence of he concurrent violation by defendants of the provisions of the acts f Congress aforesaid, plaintiff thereafter, to wit, on October 30th, 903, purchased from defendant McGraw, to wit, 25 shares of the apital stock of said bank of the par value of, to wit, $2,500, and aid therefor the sum of, to wit, $3,800, that being the apparent alue thereof, as indicated by the report aforesaid, whereas in fact he said stock was then and there of no value to plaintiff's damage f six thousand dollars, and therefore she brings suit.

Second Count. Also for that, whereas, heretofore, to wit, on the irst day of June, 1903, and for, to wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national anking corporation organized and doing business under the act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being Title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its anking office at the city of Bay City, in the district and division foresaid.

And whereas, the acts of Congress aforesaid, being Sections 5199 nd 5204 of the compilation aforesaid, provided that dividends declared upon the capital stock of any national banking association hould be declared out of the net profits thereof, and that neither ny such association nor any of its members should withdraw or permit to be withdrawn either in the form of dividends or otherwise ny portion of its capital, and that if losses had at any time been ustained by any such association equal to or exceeding its undivided rofits then on hand, no dividend should be made.

And whereas, it was thereby further provided that no dividend hould ever be made by any such association while it continued its anking operations, to an amount greater than its net profits then n hand, deducting therefrom its losses and bad debts.

And whereas, the said act of Congress aforesaid, being Section 5239 of the compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the fficers, agents or servants of the association to violate any of the rovisions of said title, every director who participated in or assented o such violation should be held liable in his personal and individual apacity for all damages which any person should have sustained in onsequence of such violation.

And whereas, the defendants and each of them then and there

knew that the payment of dividends on the stock of said bank would be understood and accepted by all persons contemplating business transactions in regard to the stock of said bank, as an assurance and representation that the capital of said bank was unimpaired and that the said stock was worth its par value and upwards, and that no losses had been sustained equal to or exceeding its undivided profits then on hand, and that its net profits then on hand after deducting therefrom its losses and bad debts equalled or exceeded the sums so declared as dividends.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the said bank to violate and not to participate in or assent to such violation of any of the provisions of the acts of Congress aforesaid in respect to the declaration of dividends as aforesaid.

And plaintiff says that the said defendants and each of them, disregarding their said duty on, to wit, the 29th day of May, 1903, to wit, the first day of June, 1903, at, to wit, the city of Bay City, aforesaid, knowingly violated and knowingly permitted, participated in and assented to the violation of the provisions of the acts of Congress aforesaid in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on, to wit, June 1st, 1903, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had theretofore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared as dividends exceeded it- net profits then on hand, after deducting therefrom its losses and bad debts.

21 And plaintiff says that, acting through her agent, Frank T. Woodworth, relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting therefrom its losses and bad debts, and that losses had not been sustained by said bank exceeding its undivided profits, plaintiff thereafter, on, to wit, October 30th, 1903, purchased from defendant McGraw, to wit, 25 shares of the capital stock of said bank of the par value of $2,500, paying therefor the sum of, to wit, $3,800, which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by defendants of the provisions of said act of Congress aforesaid, plaintiff sustained damages in the sum of six thousand dollars, and therefore she brings suit.

Third Count. Also for that, whereas, heretofore, to wit, on the 30th day of October, 1903, and for, to wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the act of

Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being Title No. 62 of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the district and division aforesaid.

And whereas, the act of Congress aforesaid being Section 5200 of the compilation aforesaid, then and there provided that the total liabilities to the bank of any person, company, corporation or firm for money borrowed (not including the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same) should at no time exceed one-tenth part of the amount of the capital stock of said bank actually paid in.

And whereas, the capital stock of the said bank actually paid in was then and there the sum of $200,000.

And whereas, the defendants and each of them then and there knew that the creation and continuance of liabilities in violation of the section aforesaid and the carrying of the same among the loans and discounts of the said bank would mislead and deceive the
22 plaintiff as a member of the public, and would cause the published reports of said bank to present to the plaintiff as a member of the public a false and misleading representation in regard to the nature and value of said loans and discounts, and that plaintiff as a member of the public had the right to rely upon the belief that the loans and discounts of said bank contained no liabilities which were created or permitted to continue in knowing violation of the section aforesaid.

And plaintiff says it was then and there the duty of the said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate and not to participate in or assent to such violation of any of the provisions of the section last aforesaid.

And plaintiff says that the defendants and each of them at, to wit, the time and place aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the said section in this, to wit, that they knowingly participated in, permitted and assented to the creation of certain liabilities to the said bank in violation of the section aforesaid, and knowingly permitted and assented to the continuance of the said liabilities and the carrying of the same among the loans and discounts of the said bank after defendants and each of them had knowledge of the nature and character of the liabilities aforesaid, and that they had been created and were being carried in violation of the section aforesaid. And plaintiff says that the liabilities aforesaid were as follows, to wit, of one Alzina Maltby, to wit, of one Alvin Maltby, doing business as the Maltby Lumber Company of Bay City, Michigan, the sum of, to wit, $200,000, and of Willard I. Brotherton, Henry N. Watrous and Henry W. Jennison, copartners doing business under the firm name of W. I. Brotherton & Company, of Bay City, Michigan, the sum of, to wit, $50,000, said liabilities being in excess of and not consisting of or created by the discount of bills of exchange drawn in good

faith against actually existing values or the discount of commercial or business paper actually owned by the person negotiating the same. And plaintiff says that the said Alzina Maltby, Alvin Maltby and the said Willard I. Brotherton, and others, doing business as W. I. Brotherton & Company, were on, to wit, the first day of January, 1903, and thereafter insolvent, and that by reason of the violation of the section aforesaid the said bank then and thereafter
23 during the entire year 1903 carried among its loans and discounts liabilities of the said Alzina Maltby, Alvin Maltby and of the said W. I. Brotherton & Co. of the face value of, to wit, $200,000, which were then and there of no value and were thereafter charged off to profit and loss upon the books of said bank. That by reason of the premises and in consequence of the concurrent violation by the defendants of the section aforesaid, in the manner aforesaid, the published reports of the said bank during the entire year 1903 presented to the public, including this plaintiff, false and misleading representations in regard to the condition of the said bank, the value of its resources, the amount of its surplus and undivided profits and the value of its capital stock.

And plaintiff says that, acting through her agent, Frank T. Woodworth, in reliance upon the belief that the loans and discounts of said bank as listed in its published reports during the year 1903 included no liabilities knowingly created or knowingly permitted to continue in violation of the section aforesaid, plaintiff, on to wit, October 30th, 1903, purchased from defendant McGraw, to wit, 25 shares of the capital stock of the said bank of the par value of, to wit, $2,500, and paid therefor the sum, of to wit, $3,800, which would have been the fair and reasonable value thereof if the said defendants had not violated the section aforesaid in the manner aforesaid, but which said stock was in fact of no value by reason whereof and in consequence of the concurrent violation by defendants of the section aforesaid, in the manner aforesaid, plaintiff suffered damages in the sum of six thousand dollars, and therefore she brings suit.

Fourth Count. Also for that, whereas, defendants heretofore, to wit, on the 30th day of October, 1903, and for, to wit, ten years prior thereto at Bay City, in said district, were directors of the Old Second National Bank, a national banking corporation, and were charged with and subject to certain duties and liabilities under Sections 5199, 5200, 5204, 5211 and 5239 of Title 62 of the United States Compiled Statutes of the Compilation of 1901, as is fully and particularly referred to and described in the preceding counts of this declaration, which said counts are hereby referred to and made a part of this count.

And plaintiff says that the said defendants, acting jointly and concurrently, knowingly violated and knowingly participated in,
24 permitted and assented to the violation of the several provisions of the acts of Congress aforesaid in the several ways and under the several circumstances set forth in the preceding counts of this declaration, which are hereby made a part of this count, and that defendants, acting as aforesaid, also knowingly violated and knowingly participated in, permitted and assented to the violation

of the several provisions of the acts of Congress aforesaid by signing, attesting and permitting and assenting to the publication of certain other false reports of the resources and liabilities of said bank at certain other dates during said year 1903, to wit, April 9th, 1903, and June 9th, 1903, all of said violations and permitted violations being portions of a general design and conspiracy on the part of the said defendants to deceive the public, including this plaintiff, for the purpose of giving the stock of the said bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the said stock, then and there held by them, at a price exceeding their true value.

And plaintiff says that, acting through her agent, Frank T. Woodworth, she was deceived and misled by and relied upon the acts and omissions of the defendants as aforesaid, by reason whereof and in consequence of the violation by defendants of the acts of Congress aforesaid plaintiff on, to wit, October 30th, 1903, purchased from defendant McGraw, to wit, 25 shares of the capital stock of said bank of the par value of, to wit, $2,500, and paid therefor the sum of, to wit, $3,800, which said sum was the apparent value thereof, and would have been the true value thereof if it had not been for the violation by the defendants of the acts of Congress aforesaid, but which said stock was in fact of no value, to plaintiff's damage of six thousand dollars, and therefore she brings suit.

GILLETT & CLARK,

Business address, Shearer Bldg., Bay City, Mich.;

JOHN C. WEADOCK,
Attorneys for Plaintiff.

Business address, 7 Wall Street, New York City.

25 *Plea and Notice of Defendant Chesbrough.*

(Filed January 2, 1913.)

The defendant, Frank P. Chesbrough, by Thomas A. E. Weadock, his attorney, demands a trial of the matters set forth in plaintiffs' declarations.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

To Gillett & Clark, Attorneys for Plaintiffs.

SIRS: Please take notice that the defendant, Frank P. Chesbrough, will, on the trial of this case, insist and give in evidence under the general issue above pleaded that the Second National Bank of Bay City, referred to in plaintiff's declaration, was organized and had its existence under and by virtue of the National Banking Act, passed and approved by the Congress of the United States, being Sections 5133 et seq. of the revised statutes of the United States. Said plaintiff was represented in all things relating to the purchase of said

stock in the Old Second National Bank by Frank T. Woodworth, her agent, and that his knowledge is her knowledge in relation to the matters in question.

That Orrin Bump, James Davidson, and his successor, James E. Davidson, were respectively the presidents of said bank, and that Orrin Bump and Martin M. Andrews were respectively the
26 cashiers of said bank during the period in question; that said bank was managed by a board of seven directors; that each of the defendants herein was a director of said bank, and that the aforesaid Orrin Bump departed this life on the 4th day of October, 1907.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency of the United States or adjudged by any court, for the reason of the violation of any of the provisions of the National Banking Act by the directors and officers of said bank, or for any other reason. That said bank has done business at Bay City continuously since its organization and is still doing business there.

This defendant denies that he knowingly signed or attested any false or incorrect report set out and referred to in the said declaration, and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiff's declaration.

That said Frank T. Woodworth, agent for said plaintiff, was employed for years prior to his purchase of stock in the Second National Bank at Bay City, described in said declaration, and was entirely familiar with the manner in said bank of making reports to the Comptroller of the Currency, and knew that the directors who signed said reports from time to time relied upon the statements on oath of the cashier that he believed said statements were correct, and other officers of the bank who prepared said statements, that they were correct. That he also knew that the condition of the bank, as shown by its books, on a designated past day, was asked for by the comptroller.

That said defendant in this cause relied on the oaths of the cashier of the bank, Martin M. Andrews, and the honesty, ability and integrity of the officers, agents and employes of said bank, and without any knowledge of anything to the contrary, signed the statements in good faith, believing them to be correct, as the said Frank T. Woodworth, agent for said plaintiff, afterwards signed the statements of the condition of said bank on January 11th and May 29th, 1905, to said comptroller, when he was a director of said bank.

That said Frank T. Woodworth, agent for said plaintiff, purchased the stock mentioned in his declaration of brokers, at his own
27 instance and for the purpose of acquiring with other parties, viz., directors of the First National Bank, a majority of the stock of said bank by himself and other parties acting with him, in order to get control of the majority of the stock of said bank and thereby procure his election to the board of directors and to the presidency of said bank, and to secure a consolidation of said banks.

That said Frank T. Woodworth, agent for said plaintiff, was employed in said bank as collection clerk for about two and one-half

years, and was then check and deposit bookkeeper for the remainder of the time he was in said bank prior to 1885; that in his business career he was a member of the firm of Slater & Woodworth and Smalley & Company, in which he was a partner, and later Smalleys & Woodworth, which firm was formed in 1890 and lasted until 1897, after which the firm was known as Woodworth & Company, all of which firms kept their accounts, discounted their paper and did all their banking business at said Second National Bank, and knew that said Smalleys & Woodworth made a compromise with said bank, by which it lost money.

That said Frank T. Woodworth, agent for said plaintiff, kept his own account and the accounts of the different firms in which he was interested from time to time for the past twenty-five years continuously in the said bank, and knew the general history of the same, and knew of the losses sustained by the said bank in the Mosher failure in 1895, and on the notes and bills mentioned in his bill of particulars, and he had this knowledge long before he purchased any of the stock of said bank, mentioned in his declaration. That he, also, knew that said bank had a large amount of Alvin Maltby's paper, at the time and before the time said stock was purchased.

That for thirty years continuously prior to January 1st, 1903, said Frank T. Woodworth, agent for said plaintiff, resided in Bay City, and was personally acquainted with the officers and employes of said Second National Bank; that he knew they were men of integrity and high character, and one of them was his near relative, and another a relative of his wife, and all of them were his near neighbors and daily associates; that in purchasing the stock of said bank, he relied upon his own knowledge of the condition of said bank, and of the men who then composed its board of directors, and who were
28 its executive officers, and he did not rely upon the printed statements set up in her declaration, nor any of them.

That said Frank Woodworth's father-in-law, James S. Smalley, who lived in his family, had been a stockholder in said bank and received dividends therefrom three or four years before he bought stock therein. That in October, 1904, said Frank T. Woodworth, agent for said plaintiff, was appointed a member of an investigating committee to look into the affairs of said bank, and acted as such, after which, as a director of said bank, he attested as correct by signing his name thereto, the statement of said bank to the Comptroller of the Currency made January 17th, 1905, which was duly published, at which time said Frank T. Woodworth, agent for said plaintiff, knew that said bank held said Maltby paper, then changed to paper of Maltby Cedar Co., a corporation formed and controlled by said bank, to the amount of $276,000.00, which he knew had not been charged off and which amount he, also knew was included in the item of "loans and discounts" in said reports, at which time said bank held all the paper mentioned in plaintiff's declaration and bill of particulars.

That on or about May 29th, 1905, said Frank T. Woodworth, agent for said plaintiff, attested as correct, by his signature as a director, the report of said bank to the Comptroller of the Currency which was, also, duly published, which report, in the item of "loans

and discounts" contained, as he well knew, the paper of Maltby & Co., Alzina Maltby, and Maltby Cedar Company, referred to in her declaration.

That in 1903, before Frank T. Woodworth, agent for said plaintiff, purchased any stock in said bank, he knew that the items of "loans and discounts" in the report to the Comptroller of the Currency contained good and bad paper and knew that all the obligation- of said bank held were included in "loans and discounts," as the law and the Comptroller of the Currency required.

That he knew about the business career of Alvin Maltby for fifteen years prior to the time that he purchased any stock in said bank, and knew that he was connected with the Mosher failure as a member of the firm of Mosher & Maltby, and that all of that time he, said Maltby, had done business at the Second National
29 Bank, which held a large amount of his paper, at the time said Frank T. Woodworth purchased the stock in the Old Second National Bank.

THOMAS A. E. WEADOCK,
Attorney for Defendant Frank P. Chesbrough.

Dated Dec. 24th, 1912.

Declaration of Eva A. Woodworth.

(Filed March 22, 1909.)

Eva A. Woodworth, of Bay City, Michigan, plaintiff herein, by Gillett & Clark and John C. Weadock, her attorneys, complains of Joseph W. McGraw, of Bay City, Michigan and Frank P. Chesbrough, of Detroit, Michigan, defendants herein, said defendants having been duly summoned to answer the said plaintiff, of a plea of trespass on the case.

First Count. For that whereas, heretofore, to-wit on the 16th day of December, 1903, and for, to-wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the District and Division aforesaid.

And whereas, the act of Congress aforesaid being Section 5211 of the Compilation aforesaid, then and there provided for the
30 making and publication by the said bank of reports exhibiting in detail and under appropriate heads the resources and liabilities of the said bank upon certain dates specified by the Comptroller of the Currency, and required the truth of said reports to be attested by at least three of the directors of said bank.

And whereas, by necessary implication the said act of Congress then and there required that such reports, when made and published should contain a true statement of the condition of said bank, and

the value of its resources, including its loans and discounts and of the amount of its surplus and undivided profits, so as to enable plaintiff as one of the public for whose information said reports were published to ascertain therefrom the value of its resources and of its capital stock; and whereas by like implication said act of Congress prohibited the making and publishing of a false report.

And whereas, the said Act of Congress aforesaid, being Section 5239 of the Compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers, agents or servants of the association to violate any of the provisions of said title, every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequences of such violation.

And whereas, the Comptroller of the Currency had then and there specified the 17th day of November, 1903, and had made requisition upon the said bank for the report of the resources and liabilities thereof upon the said day, as required by said act.

And plaintiff says that it was then and there the duty of said defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of said bank to violate and not to participate in or assent to such violation of any of the provisions of the Act of Congress aforesaid.

And plaintiff says that the defendants and each of them disregarding their duty on to-wit the, 21st day of November, 1903, to wit, the 24th day of November, 1903, at to-wit, the City of Bay City, aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the Act of Congress aforesaid, by signing, attesting, and permitting and assenting to the publi-
31 cation of a false report of the resources and liabilities of the said bank and of its condition at the close of business on November 17th, 1903, which said report was in the words and figures following, to-wit,

Report of the Condition of the Old Second National Bank, at Bay City, in the State of Michigan, at the Close of Business November 17th, 1903.

Resources.

Loans and discounts		$1,081,446.05
Overdrafts secured and unsecured		1.39
U. S. Bonds to secure circulation		200,000.00
Stocks, securities, etc.		66,953.98
Banking House furniture and fixtures		2,500.00
Due from National Banks (not reserve agents)		902.18
Due from State Banks and Bankers		9,570.95
Due from approved reserve agents		83,891.37
Checks and other cash items		462.52
Exchanges for clearing house		5,969.71
Notes of other National banks		7,965.00
Fractional paper currency, nickels and cents		528.78
Lawful money reserve in bank, viz		
Specie	40,715.00	
Legal tender notes	15,630.00	
		56,345.00
Redemption fund with U. S. Treasurer 5 per cent of circulation		10,000.00
Total		$1,526,536.93

Liabilities.

Capital stock paid in		$200,000.00
Surplus fund		75,000.00
Undivided profits less expense and taxes paid		40,733.26
National Bank Notes outstanding		200,000.00
Due to other National Banks		13,386.77
Due to State Banks and Bankers		42,837.80
32		
Individual deposits subject to check	400,837.54	
Demand certificates of deposit	503,701.56	
		904,539.10
Bills payable including certificates of deposit for money borrowed		50,000.00
Total		$1,526,536.93

STATE OF MICHIGAN,
County of Bay, ss:

I, M. M. Andrews, cashier of the above named bank, do solemnly swear that the above statement is true to the best of my knowledge and belief.

M. M. ANDREWS, *Cashier.*

Subscribed and sworn to before me this 21st day of November 1903.

H. C. CHAPIN,
Notary Public.

Correct attest:
FRANK P. CHESBROUGH,
J. W. McGRAW,
E. B. FOSS,
Directors.

And plaintiff says that said report was printed and circulated on the 22nd and 24th days of November, 1903, in the Bay City Tribune and on the 23rd day of November, 1903, in the Bay City Times both of which were public newspapers printed and circulated in the City of Bay City, aforesaid.

And plaintiff says that the said report was knowingly false in this to-wit, that certain loans and discounts of said bank were listed in said report as of the value of $1,081,446.05, leaving an unimpaired capital, a surplus fund of $75,000.00 and undivided profits less expenses and taxes paid of $40,733.26, whereas in fact the said loans and discounts were worth and were known by the said defendants and each of them then and there to be worth much less than the value at which they were so listed, and much less than their face value and less than to-wit $800,000.00 and the said item of loans and discounts included and was known by the said defendants and each of them to include commercial paper listed at or above its face value and known to be worth much less, to-wit $200,000.00 less than
33 its face value, thus materially affecting the value of the stock of said bank. And plaintiff says that the said report was knowingly false also in this to-wit, that the said bank had in fact no surplus fund and no undivided profits and had lost a large part, to-wit, upwards of one-half of its capital.

And plaintiff says that acting through her agent Frank T. Woodworth relying upon the truth of said report and in consequence of the concurrent violation by defendants of the provisions of the Acts of Congress aforesaid, plaintiff thereafter to-wit, on the 16th day of December, 1903, purchased to-wit, twenty shares of the capital stock of said bank of the par value of to-wit two thousand dollars and paid therefor the sum of to-wit $2,900.00, that being the apparent value thereof, as indicated by the report aforesaid, whereas in fact the said stock was then and there of no value, to plaintiff's damage of five thousand dollars and therefore she brings suit.

Second Count. Also for that whereas, heretofore, to-wit on the 16th day of December, 1903, and for to-wit, ten years prior thereto defendants were directors of the Old Second National Bank, a national banking corporation organized and doing business under the Act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the District and Division aforesaid.

And whereas, the acts of Congress aforesaid, being Sections 5199 and 5204 of the compilation aforesaid, provided that dividends declared upon the capital stock of any National Banking association should be declared out of the net profits thereof, and that neither any such association nor any of its members should withdraw or permit to be withdrawn either in the form of dividends or otherwise any portion of its capital and that if losses had at any time been sustained by any such association equal to or exceeding its undivided profits then on hand, no dividend should be made.

And whereas it was thereby further provided that no dividend should ever be made by any such association while it continued its banking operations, to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts.

34 And whereas, the said Act of Congress aforesaid, being Section 5239 of the Compilation aforesaid, then and there provided that if the directors of any national banking association should knowingly violate or knowingly permit any of the officers agents or servants of the association to violate any of the provisions of said title every director who participated in or assented to such violation should be held liable in his personal and individual capacity for all damages which any person should have sustained in consequence of such violation.

And whereas, the defendants and each of them then and there knew that the payment of dividends on the stock of said bank, would be understood and accepted by all persons contemplating business transactions in regard to the stock of said bank, as an assurance and representation that the capital of said bank was unimpaired and that the said stock was worth its par value and upwards and that no losses had been sustained equal to or exceeding its undivided profits then on hand, and that its net profits then on hand after deducting therefrom its losses and bad debts, equalled or exceeded the sums so declared as dividends.

And plaintiff says that thereupon it was the duty of defendants and each of them not to knowingly violate or knowingly permit any of the officers, agents or servants of the said bank to violate and not to participate in or assent to such violation of any of the provisions of the acts of Congress aforesaid, in respect to the declaration of dividends as aforesaid.

And plaintiff says that the said defendants and each of them disregarding their said duty on to-wit, the 27th day of November, 1903 to-wit, the first day of December, 1903, at to-wit the city of Bay City, aforesaid, knowingly violated and knowingly participated in, permitted and assented to the violation of the provisions of the acts of Congress aforesaid in that they and each of them participated in, voted for, permitted and assented to the declaration of a semi-annual dividend of five per cent on the capital stock of said bank, said dividend being payable on to-wit, December 1st, 1903, knowing that the said dividend would necessarily be paid out of the capital stock of said bank and not out of the net profits, and knowing that losses had theretofore been sustained equal to or exceeding its undivided profits then on hand, and that the sums so declared as dividends ex-

ceeding its net profits then on hand, after deducting therefrom its losses and bad debts.

35 And plaintiff says that acting through her agent Frank T. Woodworth, relying upon the belief that by reason of the declaration of the dividend aforesaid, the capital stock of the said bank was unimpaired and that said dividend had been declared out of and did not exceed its net profits then on hand after deducting therefrom its losses and bad debts and that losses had not been sustained by said bank exceeding its undivided profits; plaintiff thereafter on to-wit, December 16th, 1903, purchased to-wit, twenty shares of the capital stock of said bank of the par value of two thousand dollars, paying therefor the sum of to-wit, $2,900.00 which said sum was the fair and reasonable value thereof if the said dividend of five per cent had in fact been paid out of the net profits of the said bank for the six months next preceding the declaration of said dividend, but which said stock was in fact of no value, wherefore in consequence of the concurrent violation by defendants of the provisions of said act of Congress aforesaid, plaintiff sustained damages in the sum of five thousand dollars and therefore she brings suit.

Third Count. Also for that whereas, heretofore to-wit, on the 16th day of December, 1903, and for to-wit, ten years prior thereto, defendants were directors of the Old Second National Bank, a National banking corporation organized and doing business under the act of Congress of June 3, 1864, and amendments thereto, known as the National Bank Act, and being title No. 62, of the United States Compiled Statutes of the Compilation of 1901, said bank having its banking office at the city of Bay City, in the District and Division aforesaid.

And whereas, the act of Congress aforesaid being Section 5200 of the compilation aforesaid, then and there provided that the total liabilities to the bank of any person, company, corporation or firm for money borrowed (not including the discount of bills of exchange drawn in good faith against actually existing values and the discount of commercial or business paper actually owned by the person negotiating the same) should at no time exceed one tenth part of the amount of the capital stock of said bank actually paid in.

And whereas, the capital stock of the said bank actually paid in was then and there the sum of $200,000.00 .

And whereas, the defendant and each of them then and there knew that the creating and continuance of liabilities in viola-

36 tion of the section aforesaid and the carrying of the same among the loans and discounts of the said bank, would mislead and deceive the plaintiff as a member of the public and would cause the published reports of said bank to present to the plaintiff as a member of the public, a false and misleading representation in regard to the nature and value of said loans and discounts, and that plaintiff as a member of the public had the right to rely upon the belief that the loans and discounts of said bank contained no liabilities which were created or permitted to continue in knowing violation of the section aforesaid.

And plaintiff says it was then and there the duty of the said defendants and each of them not to knowingly violate or knowingly

permit any of the officers, agents, or servants of the association to violate and not to participate in or assent to such violation of any of the provisions of the section last aforesaid.

And plaintiff says that the defendants and each of them at to-wit the time and place aforesaid, knowingly violated and knowingly permitted and assented to the violation of the provisions of the said section in this to-wit, that they knowingly participated in, permitted and assented to the creating of certain liabilities to the said bank in violation of the section aforesaid and knowingly permitted and assented to the continuance of the said liabilities and the carrying of the same among the loans and discounts of the said bank after defendants and each of them had knowledge of the nature and character of the liabilities aforesaid, and that they had been created and were being carried in violation of the section aforesaid. And plaintiff says that the liabilities aforesaid were as follows, to-wit, of one Alzina Maltby, to-wit, of one Alvin Maltby, doing business as the Maltby Lumber Company, of Bay City, Michigan, the sum of to-wit $200,000.00 and of Willard I. Brotherton, Henry N. Watrous and Henry W. Jennison copartners doing business under the firm name of W. I. Brotherton & Company, of Bay City, Michigan, the sum of to-wit, $50,000.00 said liabilities being in excess of and not consisting of or created by the discount of bills of exchange drawn in good faith against actually existing values or the discount of commercial or business paper actually owned by the person negotiating the same. And plaintiff says that the said Alzina Maltby, Alvin Maltby and the said Willard I. Brotherton and others doing business as W. I. Brotherton & Company, were on to-wit, the first
37 day of January, 1903, and thereafter insolvent, and that by reason of the violation of the section aforesaid, the said bank then and thereafter during the entire year 1903, carried among its loans and discounts liabilities of the said Alzina Maltby, Alvin Maltby and of the said W. I. Brotherton & Co., of the face value of to-wit, $200,000.00 which were then and there of no value and were thereafter charged off to profit and loss upon the books of said bank. That by reason of the premises and in consequence of the concurrent violation by the defendants of the section aforesaid in the manner aforesaid, the published reports of the said bank during the entire year 1903, presented to the public, including this plaintiff, false and misleading representations in regard to the condition of the said bank, the value of its resources, the amount of its surplus and undivided profits and the value of its capital stock.

And plaintiff says that acting through her agent Frank T. Woodworth, in reliance upon the belief that the loans and discounts of said bank as listed in its published reports during the year 1903 included no liabilities knowingly created or knowingly permitted to continue in violation of the section aforesaid, plaintiff on to-wit, December 16th, 1903, purchased to-wit, twenty shares of the capital stock of the said bank of the par value of to-wit, two thousand dollars, and paid therefor the sum of to-wit, $2,900.00, which would have been the fair and reasonable value thereof if the said defendants had not violated the section aforesaid in the manner aforesaid, but which said stock was in fact of no value by reason whereof and in consequence of the concurrent violation by defendants of the section

aforesaid, in the manner aforesaid, plaintiff suffered damages in the sum of five thousand dollars and therefore she brings suit.

Fourth Count. Also, for that whereas, defendants heretofore to-wit, on the 16th day of December, 1903, and for to-wit, ten years prior thereto at Bay City in said district, were directors of the Old Second National Bank, a national banking corporation, and were charged with and subject to certain duties and liabilities under Sections 5199, 5200, 5204, 5211 and 5239 of Title 62, of the United States Compiled Statutes of the Compilation of 1901, as is fully and particularly referred to and described in the preceding counts of this declaration which said counts are hereby referred to and made a part of this count.

38 And plaintiff says that the said defendants acting jointly and concurrently, knowingly violated and knowingly participated in, permitted and assented to the violation of the several provisions of the Acts of Congress aforesaid in the several ways and under the several circumstances set forth in the preceding counts of *which* declaration which are hereby made a part of this count, and that defendants acting as aforesaid, also knowingly violated and knowingly participated in, permitted and assented to the violation of the several provisions of the acts of Congress aforesaid, by signing, attesting, and permitting and assenting to the publication of certain other false reports of the resources and liabilities of said bank at certain other dates during said year 1903, to-wit, April 9th, 1903, June 9th, 1903, and September 9th, 1903, and also by declaring and by permitting and assenting to the declaration of on to-wit, May 29th, 1903, a semi-annual dividend of five per cent payable to-wit, June 1st, 1903, all of said violations and permitted violations being portions of a general design and conspiracy on the part of the said defendants to deceive the public including this plaintiff, for the purpose of giving the stock of the said bank a fictitious market value and enabling each of the defendants and his relatives and friends to dispose of certain shares of the said stock, then and there held by them, at a price exceeding their true value.

And plaintiff says that acting through her agent Frank T. Woodworth she was deceived and mislead by and relied upon the acts and omissions of the defendants as aforesaid, by reason whereof and in consequence of the violation by defendants of the Acts of Congress aforesaid, plaintiff on to-wit, December 16th, 1903, purchased to-wit, twenty shares of the capital stock of said bank of the par value to-wit, two thousand dollars and paid therefor the sum of to-wit, $2,900.00 which said sum was the apparent value thereof and would have been the true value thereof if it had not been for the violation by defendants of the Acts of Congress aforesaid, but which said stock was in fact of no value, to plaintiff's damage of five thousand dollars and therefore she brings suit.

GILLETT & CLARK,

Business address: Shearer Bldg., Bay City, Mich.;

JOHN C. WEADOCK,

Business address: 7 Wall Street, New York City,

Attorneys for Plaintiff.

39 *Plea and Notice of Defendant Chesbrough.*

(Filed Jan. 2, 1913.)

The defendant, Frank P. Chesbrough, by Thomas A. E. Weadock, his attorney, demands a trial of the matters set forth in plaintiffs' declarations.

THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough.

To Gillett & Clark, Attorneys for Plaintiffs.

SIRS: Please take notice that the defendant, Frank P. Chesbrough, will on the trial of this case insist and give in evidence under the general issue above pleaded, that the Second National Bank of Bay City, referred to in plaintiff's declaration, was organized and had its existence under and by virtue of the National Banking Act passed and approved by the Congress of the United States, being Sections 5133 et seq. of the revised statutes of the United States. Said plaintiff was represented in all things relating to the purchase of said stock in the Old Second National Bank by Frank T. Woodworth, her agent, and that his knowledge is her knowledge in relation to the matters in question.

That Orrin Bump, James Davidson and his successor, James E. Davidson, were respectively the presidents of said bank, and that Orrin Bump, and Martin M. Andrews were respectively the cashiers of said bank during the period in question; that said bank
40 was managed by a board of seven directors; that each of the defendants herein was a director of said bank, and that the aforesaid Orrin Bump departed this life on the the 4th day of October, 1907.

That no forfeiture of the franchise of the said banking association has ever been declared by the Comptroller of the Currency of the United States or adjudged by any court, for the reason of the violation of any of the provisions of the National Banking Act by the directors and officers of said bank, or for any other reason. That said bank has done business at Bay City continuously since its organization and is still doing business there.

This defendant denies that he knowingly signed or attested any false or incorrect report set out and referred to in the said declaration, and denies that he made, signed or attested any report purporting to show the condition of said bank for the purpose and in the manner alleged in the plaintiff's declaration.

That said Frank T. Woodworth, agent for said plaintiff, was employed for years prior to his purchase of stock in the Second National Bank at Bay City, described in said declaration, and was entirely familiar with the manner in said bank of making reports to the Comptroller of the Currency, and knew that the directors who signed said reports from time to time relied upon the statements on oath of the cashier that he believed said statements were correct,

and other officers of the bank, who prepared said statements, that they were correct. That he, also, knew that the condition of the bank, as shown by its books, on a designated past day was asked for by the Comptroller.

That said defendant in this cause relied on the oaths of the cashier of the bank, Martin M. Andrews, and the honest-, ability, and integrity of the officers, agents, and employees of said bank, and without any knowledge of anything to the contrary, signed the statements in good faith, believing them to be correct, as the said Frank T. Woodworth agent for said plaintiff afterwards signed the statements of the condition of said bank on January 11th, and May 29th, 1905, to said Comptroller, when he was a director of said bank.

That said Frank T. Woodworth, agent for said plaintiff, purchased the stock mentioned in his declaration, of brokers, at his own instance and for the purpose of acquiring with other parties,
41 viz., directors of the First National Bank, a majority of the stock of said bank by himself and other parties acting with him, in order to get control of the majority of the stock of said bank, and thereby procure his election to the board of directors and to the presidency of said bank, and to secure a consolidation of said banks.

That said Frank T. Woodworth, agent for said plaintiff was employed in said bank as collection clerk for about two and one-half years and was then check and deposit bookkeeper for the remainder of the time he was in said bank prior to 1885; that in his business career he was a member of the firms of Slater & Woodworth and Smalley & Company, in which he was a partner, and later Smalleys & Woodworth, which firm was formed in 1890 and lasted until 1897, after which the firm was known as Woodworth & Company, all of which firms kept their accounts, discounted their paper and did all their banking business at said Second National Bank, and knew that said Smalleys & Woodworth made a compromise with said bank, by which it lost money.

That said Frank T. Woodworth, agent for said plaintiff, kept his own account and the accounts of the different firms in which he was interested from time to time for the past twenty-five years continuously in the said bank, and knew the general history of the same, and knew of the losses sustained by the said bank in the Mosher failure in 1895, and on the notes and bills mentioned in his bill of particulars, and he had this knowledge long before he purchased any of the stock of said bank, mentioned in his declaration. That he, also, knew that said bank had a large amount of Alvin Maltby's paper, at the time and before the time said stock was purchased.

That for thirty years continuously prior to January 1st, 1903, said Frank T. Woodworth, agent for said plaintiff, resided in Bay City, and was personally acquainted with the officers and employees of said Second National Bank; that he knew they were men of integrity and high character, and one of them was his near relative, and another a relative of his wife, and all of them were his near neighbors and daily associates; that in purchasing the stock of said bank he relied upon his own knowledege of the condition of said

bank, and of the men who then composed its board of direc-
42 tors, and who were its executive officers, and he did not rely upon the printed statements set up in her declaration, nor any of them.

That said Frank T. Woodworth's father-in-law, James S. Smalley, who lived in his family, had been a stockholder in said bank and received dividends therefrom three or four years before he bought stock therein. That in October, 1904, said Frank T. Woodworth, agent for said plaintiff, was appointed a member of an investigating committee to look into the affairs of said bank, and acted as such, after which, as a director of said bank, he attested as correct by signing his name thereto, the statement of said bank to the Comptroller of the Currency made January 17th, 1905, which was duly published, at which time said Frank T. Woodworth, agent for said plaintiff, knew that said bank held said Maltby paper, then changed to paper of Maltby Cedar Co., a corporation formed and controlled by said bank, to the amount of $276,000.00, which he knew had not been charged off and which amount he, also, knew was included in the item of "loans and discounts" in said reports, at which time said bank held all the paper mentioned in plaintiff's declaration and bill of particulars.

That on or about May 29th, 1905, said Frank T. Woodworth, agent for said plaintiff, attested as correct, by his signature as a director, the report of said bank to the Comptroller of the Currency which was, also, duly published, which report, in the item of "loans and discounts" contained, as he well knew, the paper of Maltby & Co., Alzina Maltby, and Maltby Cedar Company, referred to in her declaration.

That in 1903, before Frank T. Woodworth, agent for said plaintiff, purchased any stock in said bank, he knew that the items of "loans and discounts" in the report to the Comptroller of the Currency contained good and bad paper and knew that all the obligations said bank held were included in "loans and discounts" as the law and the Comptroller of the Currency required.

That he knew about the business career of Alvin Maltby for fifteen years prior to the time that he purchased any stock in said bank, and knew that he was connected with the Mosher failure as
43 a member of the firm of Mosher & Maltby, and that all of that time he, said Maltby, had done business at the Second National Bank, which held a large amount of his paper, at the time said Frank T. Woodworth purchased the stock in the Old Second National Bank.

THOMAS A. E. WEADOCK,
Attorney for Defendant Frank P. Chesbrough.

Dated December 24th, 1912.

Motion to Consolidate Case.

(Filed April 18, 1912.)

Now comes the above named plaintiff by Gillett & Clark and John C. Weadock, her attorneys, and moves the court by virtue of the authority vested in the said court by act of Congress, to enter an order providing that the issues for the jury in the above entitled cause be tried together with and by the same jury as the issues in the following causes, viz: Frank T. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough, Mary L. Hotchkiss vs. Joseph W. McGraw and Frank P. Chesbrough, and Eva A. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough, and that the said causes be consolidated for trial; said issues to be tried at the time which may hereafter be assigned for the trial of the case of Frank T. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough.

GILLETT & CLARK,
JOHN C. WEADOCK,
Attorneys for Plaintiff.

Same motion made in cases of Eva A. Woodworth and Mary L. Hotchkiss against same defendants.

44 *Order of Consolidation.*

(Entered May 28, 1912.)

The motions of the respective plaintiffs in the above entitled causes that the causes be consolidated for trial and that the issues therein be tried together by the same jury, coming on to be heard; after hearing Edward S. Clark, Esquire, in support thereof, and T. A. E. Weadock, Esquire, and M. L. Courtright, Esquire, opposed, and after due deliberation thereon it is by the court

Ordered that said motion be denied as regards case No. 137, Frank T. Woodworth vs. Joseph W. McGraw, et al., and granted as to the other said causes, viz: Numbers 143, 144 and 145.

Suggestion of Death of Joseph W. McGraw.

(Filed October 2, 1917.)

Said plaintiffs, by their attorneys, Gillett & Clark, hereby suggest upon the record the death of defendant, Joseph W. McGraw, on the 4th day of September, 1914.

On motion of plaintiffs by Gillett & Clark, their attorneys, it is hereby ordered that the above entitled consolidated causes be and the same are hereby discontinued as against said defendant, Joseph W. McGraw, deceased.

GILLETT & CLARK,
Attorneys for Plaintiffs.

Dated October 2, 1917.

45 *Waiver of Jury Trial.*

(Filed October 2, 1917.)

In this cause, it is hereby stipulated by the parties hereto, through their respective attorneys, that the same may be submitted to the court without a jury which is hereby waived.

Dated, October 2nd, A. D. 1917.

GILLETT & CLARK,
Attorneys for Plaintiffs.
THOMAS A. E. WEADOCK,
Attorney for Defendant Frank P. Chesbrough.
M. L. COURTRIGHT,
Attorney for Defendant Jos. S. McGraw.

Bill of Exceptions.

(Filed November 12, 1917.)

Be it remembered that on the 2nd day of October, A. D. 1917, this cause came on to be tried before Hon. Arthur J. Tuttle, district judge, without a jury; a jury having been waived by stipulation in writing.

All the plaintiffs appeared by Edward S. Clark.

The defendant was represented by Thomas A. E. Weadock, and the following proceedings were had:

Counsel for plaintiffs moved for judgment in favor of the individual plaintiffs in the amounts set forth below, pursuant to the stipulation of May 24th, 1913.

46 *Stipulation.*

"In consideration of the fact that the above entitled causes involve approximately the same facts as the case of Frank T. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough (Calendar No. 137), in which a verdict was rendered in this court in favor of the plaintiff on December 19th, 1912, and for the purpose of saving the trouble and expense of litigation, it is hereby stipulated and agreed as follows:

1. That the above entitled causes shall in all respects and as to all parties therein, be governed and concluded by the final result in the said case of Frank T. Woodward, plaintiff, against Joseph W. McGraw and Frank P. Chesbrough, defendants, which is hereinafter referred to as case Number 137.

2. In view of the fact that the amount of stock purchased by each of said plaintiffs and involved in said actions was as follows, viz: by Frank T. Woodward 155 shares, by Mary L. Hotchkiss 25 shares, by Eva A. Woodworth 20 shares, and by Margaret A. Smalley 10 shares. It is further agreed that if and when final judgment is entered upon the verdict heretofore rendered in said case Number 137,

or on any verdict that may hereafter be rendered therein and when proceedings (if any) for the review of said judgment have been concluded or abandoned so that execution may be issued thereon, then judgment shall be forthwith entered and execution issued in the above entitled causes, for the following amounts respectively, viz:

47 In favor of Mary L. Hotchkiss, plaintiff, in case Number 143, in an amount equal to 5/31 of the amount then due with accrued interest upon the judgment in said case Number 137.

In favor of Eva A. Woodworth, plaintiff, in case Number 144, in an amount equal to 4/31 of the amount then due with accrued interest upon the judgment in said case Number 137.

In favor of Margaret A. Smalley, plaintiff, in case Number 145, in an amount equal to 2/31 of the amount then due, with accrued interest upon the judgment in said case Number 137.

Dated, May 24, 1913.

GILLETT & CLARK,
Attorneys for Plaintiffs.
M. L. COURTRIGHT,
Attorney for Defendant McGraw.
THOMAS A. E. WEADOCK,
Attorney for Defendant Chesbrough."

48 *Judgment.*

Judgment in the case of Frank T. Woodworth against Frank P. Chesbrough and Joseph W. McGraw heretofore rendered in this court, reviewed in the Court of Appeals of this circuit, and judgment entered as of November 22nd, 1913 for the sum of $16,005.44, which judgment was affirmed by the Supreme Court of the United States on May 21st, 1917, and amounted on the 2nd day of October, 1917, to the sum of $19,095.38, and after the adjustment of the costs between the parties, amounted to the sum of $18,551.26, which amount was paid on that day, and the judgment satisfied of record.

The death of defendant, Joseph W. McGraw was suggested of record, and the suits discontinued by plaintiffs as to him.

The amounts for which judgments were asked by plaintiffs' counsel in this consolidated case, were:

Mary L. Hotchkiss	$3,079.90
Eva A. Woodworth	$2,463.92
Margaret A. Smalley	$1,231.96

Narrative of Proofs.

These cases had been consolidated by an order of Judge Angell, predecessor of Judge Tuttle.

Counsel for plaintiffs stated *that* his understanding of the practice to be that separate judgments must nevertheless be entered in the three cases.

Mr. Weadock: "The difference between counsel for plaintiffs and myself in this matter is the construction of the stipulation above

quoted, and resulting from that, a difference as to the amount of the judgments. My contention is that the Supreme Court of the United States did not affirm the judgment of this court, rendered
49 November 22nd, 1913, for $23,714.00; that judgment was reversed, and a new trial granted, unless the plaintiff in that case would remit the sum of $7,708.56, and he did so remit, and file a certified copy of the remittitur in the Circuit Court of Appeals, then the judgment would be affirmed at the sum of $16,005.44. Plaintiff did remit this sum on May 7th, 1915, whereupon the judgment in the reduced amount was affirmed by the Court of Appeals on the eleventh day of May 1915."

The defendant Chesbrough then sued out a writ of error to the Supreme Court of the United States, and the plaintiff, Woodworth, sued out a cross-writ of error to the same court.

Mr. Chesbrough's counsel made a motion on June 17, 1915, to dismiss the cross-writ of error, and on the hearing of the case in the Supreme Court, that motion was granted, and upon Chesbrough's writ, the judgment of the Court of Appeals was affirmed.

In the opinion of the Supreme Court of the United States, it is said that the jury, speaking of the first case, "returned a verdict for the amounts plaintiff paid for his stock, less its then book value." My contention is here that the jury did not allow the book value of the stock either in the first or in the second trial. The jury in the last trial followed exactly your Honor's statement of the matter in the charge and gave just the amount your Honor told them to give with a few dollars over. You said:

"If you find that plaintiff is correct in these claims and in the amount claimed, the measure of his damages would be as follows: For his first purchase, which was a purchase of 20 shares, or one per cent. of the capital stock of the bank, his damages would be one per cent. of the $200,000.00 or $2,000.00, with interest from March 14th, 1903, to the date of your verdict, at five per cent., which is claimed to be $975.56, making a total claim for his first purchase of $2,975.56. For his second purchase, which was a purchase of 25 shares, or 1¼ per cent. of the capital stock of the bank, he would be entitled to recover 1¼ per cent. of $200,000.00 or $2,500.00, together with interest at five per cent. from May 26th, 1903, to the date of your verdict, which is claimed to be $1,194.45, making a total claim for the second purchase of $3,694.45. For the third purchase, which
50 was a purchase of 30 shares, or 1½ per cent. of the capital stock of the bank, he would be entitled to recover 1½ per cent. of $200,000.00 or $3,000.00, together with interest at five per cent. from September 16th, 1903, which is claimed to be the sum of $1,387.50, making a total claim for the third purchase of $4,387.50. For the fourth purchase, which was a purchase of eighty shares, or four per cent. of the capital stock of the bank, his damages would be four per cent of $200,000.00 or $8,000.00, with interest at five per cent, from December 16th, 1903, which is claimed to amount to $3,600.00, making a claimed total for the fourth purchase of $11,600.00. The total sum so claimed would therefore be as follows: For the first purchase with interest, $2,975.56; for the second pur-

chase with interest, $3,694.45; for the third purchase with interest, $4,387.50; for the fourth purchase with interest, $11,600.00; making the total amount with interest, $22,657.51."

Then you spoke of each of the purchases in the same way. Now the verdict was $22,662.98, so that you can see at once from that they did not allow a cent for the value of the stock. Now, the record shows that on March 23, 1905, Frank Woodworth sold five shares of his which had been reduced to 2½ shares at $75 a share to Martin M. Andrews, and the record, also, shows that in the latter part of October, 1911, Woodworth sold the balance of his stock at 105 which would show that his stock was worth $52.50 and that element has been entirely ignored in making up the amount of this judgment. In connection with that I offer to show that these plaintiffs sold their stock.

Eva E. Woodworth sold her 10 shares to which her 20 shares had been reduced, on October 16th, 1911, to James E. Davidson and to Mrs. Elizabeth Foss, one half to each, and I offer to show that the price received by them was 105 per share. Margaret A. Smalley sold her shares, certificate Number 251, 5 shares dated March 7th, 1905, and transferred July 24, 1912 to R. C. Bialy of Bay City at the same price. Mary L. Hotchkiss sold her 12½ shares to which her 25 shares had been reduced on the 24th of August, 1912, to James E. Davidson 6 shares and to E. B. Foss 6½ shares at the same price.

So that calling attention to the motion made this morning to correct the judgment in the case of Woodworth vs. Chesbrough and McGraw, from $16,005.44 by deduction to the number of shares he sold to Andrews and interest thereon for the 8 years, 8
51 months, 29 days, making in all $527.45, it would leave the proper amount of the judgment at $15,467.99, which with interest at 5% to October 2, 1917, from November 22nd, 1913, the date of the judgment, 3 years, 10 months, 10 days, would equal $3,110.89, making in all $18,578.88 and not $19,095.38. The result of this would be as I contend under the stipulation that the claim of Mary L. Hotchkiss for 25 shares which would be 25/150 of the Frank T. Woodworth stock would be $2,578, less the book value of the stock at $75 per share, $1,875, leaving a balance of $703 upon which there will be interest for 3 years, 10 months and 10 days at 5% amounting to $106.03, leaving the amount she ought to receive a judgment for as $809.03. In the case of Eva A. Woodworth she would get 4/5 of that amount or 20 shares which would amount by the same process to a judgment in her favor for $647.20 and the claim of Margaret A. Smalley computed in the same way would amount to $318.60.

I further submit that these cases could not be consolidated for the purpose of giving the court jurisdiction and the amount in dispute being less than $3,000.00 in each case, judgment must be rendered for defendant in all the cases.

The book value of the stock and the other testimony that may be necessary for your Honor in preparing or submitting your findings of fact in the matter is all found in the printed record of the case

in the Court of Appeals, and if your Honor desires we should put that in different form, that could be done later on.

Mr. Clark: Suppose we concede that the record of the Supreme Court of the United States be accepted as a statement of facts in this case as well as the other case.

Mr. Weadock: That is satisfactory so far as the facts become material. I would not want to print that record again, as most of the facts are now immaterial. If the matter is viewed in another way and on the basis of the $52.50 per share as the book value, taking the corrected judgment at $15,467.99, Mary L. Hotchkiss' share would be $1,921.75, and the other computation would be made in the same way. That would be simply a matter of figures for which it is not necessary to take the time of the court. The real contention between us is that the book value of the stock was not allowed us in any computation by the jury and the construction of the Supreme Court of the United States is that it should have
52 been allowed, and they seem to have the idea that it was allowed, but it is only necessary to call your attention to the figures to show that it was not allowed. Aside from that and with the necessary changes of figures there would be no question about it. I therefore submit that judgment should be rendered for the defendant in each of these issues.

Mr. Clark: As to the meaning of what the Supreme Court of the United States said and whether the book value was deducted, I think this can be presented more clearly by a brief. Here is a stipulation to enter judgment——

Mr. Weadock: It is not necessary, I presume to file any formal request for a finding of facts. I think you will have sufficient before you. Had we better submit findings?

The Court: I think you had better submit them for the purpose of saving time. The sooner, the better.

Mr. Weadock: You will have it within that time. If this judgment is adverse, I want sufficient time to settle the case for review.

Mr. Clark: A short time would be required.

Mr. Weadock: A small record. We have got to put it all in shape.

Mr. Clark: Thirty days.

Mr. Weadock: Make it forty. I——

The Court: You have it before you here. I will say that I have read the stipulation and it seems to me it says in plain language that judgment in each of these cases should be entered. This is my present view and undoubtedly my final view so it will assist you in getting your record.

Defendant excepted.

Mr. Weadock: Let me call you- Honor's attention to the part of the stipulation that says these cases shall abide the event of the other suit.

Mr. Clark: If a record is to be made for the Court of Appeals, I wish the following matters to appear:

I offer in evidence a copy of the printed record filed in the Supreme Court of the United States in the case of Frank P. Chesbrough, plaintiff in error, against Frank T. Woodworth, being number 179 of the October term, 1916. This is case number 137 in this court. The object of this offer is to have the record contain a statement of such facts as may be considered of importance. This is for purposes of references only, and I see no necessity for having the entire record in that case copied into the present record.

53 I, also, offer in evidence the satisfaction of judgment filed in the case of Frank T. Woodworth vs. Frank P. Chesbrough, Number 137, which shows that the amount due and paid on the judgment in that case on October 2nd, 1917, is $19,095.38, exclusive of costs.

I, also, offer in evidence a copy of the petition for rehearing filed by Frank P. Chesbrough, as plaintiff in error in case number 179 of the October term, 1916, of the Supreme Court of the United States. This is offered for the purpose of showing that a re-hearing was asked for and denied and that the following was first ground upon which such re-hearing was asked:

"First. In the opinion of this court in this cause on page three, it is stated:

"A verdict was returned and judgment entered upon it for the amounts plaintiff had paid for his stock less its then book value, etc."

In this conclusion, the court overlooked the undisputed fact that nothing was allowed for the book value of the stock at any time either on the first or second trial.

The amount of the verdict showed that the jury allowed nothing for the book value of the stock, and the trial court's charge did not permit them to allow anything. (R. 387 last par.)

Yet the undisputed evidence in the record, p. 368, shows that it was worth at least $52.50 a share."

54 *Findings of Fact.*

(1) The amount of stock purchased by each of the plaintiffs and the date of the purchase are shown by the declaration in each case. The purchase was made in each case by Frank T. Woodworth, as agent for the plaintiff. With the exception of these details, the cases involve precisely the same facts as the case of Frank T. Woodworth against Joseph W. McGraw and Frank P. Chesbrough, which is case Number 137 in this court, recently decided by the Supreme Court of the United States. This, as conceded by counsel for all parties, is the meaning of the recital in the stipulation that—"The above entitled causes involve approximately the same facts as the case of Frank T. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough, Calendar Number 137." This was all conceded in open court before me when the stipulation was made.

(2) When the attorneys for the respective parties signed the stipulation dated May 24, 1913, which is now a part of the record

herein, plaintiff's attorneys were seeking to bring these cases on for trial and defendant's attorneys were seeking to delay their trial until the final decision of the case of Frank T. Woodworth. The stipulation was made at my suggestion and with my approval as a compromise between the parties.

(3) I find that the jury, in making up their verdict in case number 137, allowed no damages for anything more than plaintiff's proportion of the $200,000 claimed to have been knowingly lost upon the Maltby paper. They thus necessarily excluded from plaintiff's recovery the book value of the stock purchased, after deducting its pro rata share of such loss.

55 (4) I find that final judgment has been entered upon the verdict heretofore rendered in case number 137, Frank T. Woodworth vs. Frank P. Chesbrough. That proceedings for the review of said judgment have been concluded, so that execution might have been issued thereon, and that by reason thereof, said judgment was paid and satisfied on October 2, 1917, on which date there was due and paid on said judgment the sum of $19,095.38.

(5) I find that the amount due on October 2, 1917 to Mary L. Hotchkiss, plaintiff in case number 143, was the sum of $3,079.90.

(6) I find that the amount due on October 2, 1917, to Eva A. Woodworth, plaintiff in case number 144, was the sum of $2,463.92.

(7) I find that the amount due on October 2, 1917, to Margaret A. Smalley, plaintiff in case number 145, was the sum of $1,231.96.

Conclusions of Law.

(1) Judgment should be entered in favor of Mary L. Hotchkiss, plaintiff in case number 143, for the sum of $3,079.990, nunc pro tunc, as of October 2, 1917.

(2) Judgment should be entered in favor of Eva A. Woodworth, plaintiff in case number 144, for the sum of $2,463.92, nunc pro tunc as of October 2nd, 1917.

(3) Judgment should be entered in favor of Margaret A. Smalley, plaintiff in case number 145, for the sum of $1231.96, nunc pro tunc as of October 2, 1917.

Judgments may be entered accordingly.

ARTHUR J. TUTTLE,
District Judge.

Dated: October 20th, 1917.

56 *Exceptions to Findings of Fact and Conclusions of Law.*

And now comes the above named defendant, Frank P. Chesbrough, by Thomas A. E. Weadock, his attorney, and by special leave of the court, nunc pro tunc as of October 20th, 1917, excepts to the first finding of fact, for the reason that it is not sufficiently full in that:

The stipulation of May 22nd provided that these cases should "abide the event" of the case of Frank T. Woodworth vs. Joseph W. McGraw and Frank P. Chesbrough, and defendant's contention is

that the event of that suit requires that an allowance should be made for the book value of the stock.

Second. This defendant excepts to the finding "the stipulation was made at my suggestion, and with my approval as a compromise between the parties"; if this is intended to mean that it was in any sense a compromise of the defendant's rights, because the stipulation only referred to these suits abiding the final event of the Frank T. Woodworth case which had been tried.

Fifth. Because there should be deducted from the amount of the judgment in favor of Mary L. Hotchkiss, the book value of her stock, with legal interest thereon from the date of its purchase to the date of the judgment herein.

Sixth. This finding is excepted to, because the amount of the judgment for Eva A. Woodworth, under the aforesaid stipulation, should be reduced by the amount of the book value of her stock, with legal interest thereon, as above, to the date of said judgment from the date of its purchase.

Seventh. This finding is excepted to, because from the amount found due by the court, there should be deducted the book value of the stock of Margaret A. Smalley, with legal interest thereon, from the date of purchase to the date of said judgment, and defendant further excepts to the aforesaid Fifth, Sixth and Seventh
57 findings of fact that if and when the proper deductions were made, the amount in each case would be below the amount necessary to give this court jurisdiction, and not being class claims, judgment should have been rendered for the defendant.

Exceptions to Conclusions of Law.

Defendant excepts to each conclusion of law herein, First, Second, and Third, because upon the record in this cause, and the offers, concessions, and statements made in open court, the plaintiffs were not entitled to judgment for the reasons above given, nor was either of them.

THOMAS A. E. WEADOCK,
Attorney for Defendant.

Dated October 31, as of October 20, A. D. 1917.

On October 22nd, A. D. 1917, nunc pro tunc as of October 2, 1917, judgment was duly entered in favor of said plaintiff, Mary L. Hotchkiss, and against defendant, Frank P. Chesbrough, for the sum of $3,079.90.

And in favor of said plaintiff, Eva A. Woodworth, against said defendant, Frank P. Chesbrough, for the sum of $2,463.92, nunc pro tunc as of October 2, 1917.

And in favor of said plaintiff, Margaret A. Smalley, against said defendant, Frank P. Chesbrough, for the sum of $1,231.96, nunc pro tunc as of October 2, 1917.

And now, in furtherance of justice and that right may be done, the defendant, Frank P. Chesbrough, within the time allowed by the

court for that purpose, tenders and presents the foregoing as his bil
of exceptions in this case as to the action of the court, and prays tha
the same may be settled and allowed, and signed and sealed by th
court and made a part of the record, and the same is accordingl
done this 12th day of November, A. D. 1917.

The foregoing contains all the proceedings in the case.

ARTHUR J. TUTTLE,
District Judge.

THOMAS A. E. WEADOCK,
Attorney for Defendant.

58 *Assignments of Error.*

(Filed November 23, 1917.)

The defendant, Frank P. Chesbrough, in this action, in connectio
with his petition for writ of error, makes the following assignment o
errors which he avers occurred upon the hearing of the cause, to-wit

First. The court erred in rendering judgment for the plaintif
Mary L. Hotchkiss, in the sum of $3,079.90, and in not deductin
from said amount, the book value of the stock purchased by or fo
Mary L. Hotchkiss, with legal interest thereon.

Second. The court erred in rendering judgment for the plaintif
Eva A. Woodworth, in the sum of $2,463.92, and in not deductin
from said amount, the book value of the stock purchased by or fo
said Eva A. Woodworth, with legal interest thereon.

Third. The court erred in rendering judgment for the plaintif
Margaret A. Smalley, in the sum of $1,231.96, and in not deductin
from said amount, the book value of the stock purchased by or fo
said Margaret A. Smalley, with legal interest thereon.

Fourth. The court erred in its construction of the stipulation file
in this cause, dated May 24th, 1913, in holding that the event o
the suit of Frank T. Woodworth vs. Frank P. Chesbrough did no
contemplate a deduction from the amount of damages claimed b
the respective plaintiffs, of the then book value of their respectiv
shares and amounts of stock, together with the legal intere
thereon.

59 Fifth. The court erred in giving judgment for either o
said plaintiffs, for the reason that the amount actually an
lawfully claimed by each, as appears from their declaration, a
affected by said stipulation, was less than the amount necessary t
give said court jurisdiction in each particular case, and said cause
were not class actions, and could not be consolidated for the pu
pose of making up the jurisdictional amount of three thousand do
lars.

Sixth. The court erred in not rendering judgment for defendan
in each individual case of the Consolidated Case.

Wherefore, the plaintiff in error prays that the judgment of sai
District Court may be reversed, set aside, and held for naught.

THOMAS A. E. WEADOCK,
Attorney for Plaintiff in Error.

Dated November 12th, A. D. 1917.

60 *Petition for Writ of Error.*

(Filed November 23, 1917.)

And now comes Frank P. Chesbrough, defendant herein, and says that on the 22nd day of October, 1917, as of the 2nd day of October in said year, this court entered judgment herein in favor of said plaintiff, Mary L. Hotchkiss, in the sum of $3,079.90, and in favor of said plaintiff, Eva A. Woodworth, in the sum of $2,463.92, and in favor of said plaintiff Margaret A. Smalley, in the sum of $1,231.96, each of said judgments being against said defendant, in which judgments and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals for the Sixth Circuit for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated may be sent to the said Circuit Court of Appeals.

FRANK P. CHESBROUGH.

THOMAS A. E. WEADOCK, *Attorney.*

Detroit, Mich., Nov. 12, 1917.

61 *Supersedeas Bond.*

(Filed November 20, 1917.)

Know all men by these presents, that we, Frank P. Chesbrough, as principal, and William J. Chesbrough, Robert E. Chesbrough, and Thomas A. E. Weadock, as sureties, all of Detroit, are held and firmly bound unto the plaintiff, Mary L. Hotchkiss, in the sum of Six Thousand, One Hundred Fifty-nine and 80/100 ($6,159.80) Dollars, the plaintiff, Eva A. Woodworth, in the sum of Four Thousand, Nine Hundred Twenty-seven and 84/100 ($4,927.84) Dollars, and the plaintiff, Margaret A. Smalley, in the sum of Two Thousand, Four Hundred Sixty-three and 92/100 ($2,463.92) Dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 12th day of November, in the year of our Lord, One Thousand, Nine Hundred and Seventeen.

Whereas, lately in the District Court of the United States, for the Eastern District of Michigan, Northern Division, in a suit pending in said court between the said plaintiffs and Frank P. Chesbrough as defendant, a judgment was rendered against said defendant on the 22nd day of October, A. D. 1917, as of the 2nd day of October, A. D. 1917; the amount of said judgment in favor of said Mary L. Hotchkiss being $3,079.90, and in favor of said Eva A. Woodworth being $2,463.92, and in favor of said Margaret A. Smalley being

$1,231.96, and said defendant, Frank P. Chesbrough being
62 about to apply for a writ of error from the United States Circuit Court of Appeals for this circuit, to reverse said judgments:

Now, the condition of the above obligation is such that if the said Frank P. Chesbrough shall prosecute said writ of error to effect, and answer all damages and costs, if he fails to make such appeal good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) FRANK P. CHESBROUGH.
W. J. CHESBROUGH.
ROBERT E. CHESBROUGH.
THOMAS A. E. WEADOCK.

Signed, sealed and delivered in the presence of:
SEWARD M. SHAW.

Approved as to form and sufficiency.
(Signed) ARTHUR J. TUTTLE,
District Judge.

63 *Writ of Error.*

United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

The President of the United States to the Honorable the Judges of the District Court of the United States for the Eastern District of Michigan, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between Mary L. Hotchkiss, Eva A. Woodworth and Margaret A. Smalley, Plaintiffs, and Frank P. Chesbrough, Defendant, a manifest error hath happened, to the great damage of the said Defendant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Sixth Circuit, together with this writ, so that you have the same at Cincinnati, in said Circuit, on the 22nd day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being
64 inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, the twenty-third day of November, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-second.

[Seal of Court.]

ELMER W. VOORHEIS,
Clerk of the District Court of the United States for the Eastern District of Michigan.

Allowed by
ARTHUR J. TUTTLE,
United States District Judge.

UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss.

65 *Citation.*

United States Circuit Court of Appeals for the Sixth Circuit.

To Mary L. Hotchkiss, Eva A. Woodworth and Margaret A. Smalley, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals, to be holden at the City of Cincinnati, in said Circuit, on the 22nd day of December next, pursuant to writ of error filed in the Clerk's Office of the District Court of the United States for the Eastern District of Michigan, wherein Frank P. Chesbrough is Plaintiff in Error, and you are Defendants in Error to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error in the said U. S. District Court mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward Douglass White, Chief Justice of the United States, this twenty-third day of November, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America the one hundred and forty-second.

ARTHUR J. TUTTLE,
United States District Judge.

66 *Order Extending Time to File and Docket Record on Writ of Error.*

(Entered December 20, 1917.)

Upon the application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and

docket printed record on appeal in this cause, be and the same is hereby extended to and including January 22, 1918.

ARTHUR J. TUTTLE,
United States District Judge.

Order Extending Time to File and Docket Printed Record on Writ of Error to February 22nd, 1918.

(Signed and Entered January 22, 1918.)

Upon the application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and docket printed record on appeal in this cause, be and the same is hereby extended to and including February 22, 1918.

ARTHUR J. TUTTLE,
United States District Judge.

67 *Order Extending Time to File and Docket Record on Writ of Error.*

(Entered Feb. 21, 1918.)

Upon the application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and docket printed record on appeal in this cause, be and the same is hereby extended to and including March 22, 1918.

ARTHUR J. TUTTLE,
United States District Judge.

Order Extending Time to File and Docket Record on Writ of Error.

(Entered March 22, 1918.)

Upon the application of the Clerk of this Court, for cause shown, it is by the Court now here ordered that the time in which to file and docket printed record on appeal in this cause, be and the same is hereby extended to and including April 22nd, 1918.

(Sgd.) ARTHUR J. TUTTLE,
United States District Judge.

68 UNITED STATES OF AMERICA,
Eastern District of Michigan,
Northern Division, ss:

In the District Court of the United States for the Eastern District of Michigan, Northern Division.

FRANK P. CHESBROUGH

vs.

EVA A. WOODWORTH, MARY L. HOTCHKISS, and MARGARET A. SMALLEY.

I, Elmer W. Voorheis, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the within and foregoing is a true and correct transcript of record as desired by attorneys for respective parties to be included in printed transcript of record on writ of error, that I have compared the same with the originals on file and of record in my office, and that the same is a true and correct transcript of the whole and of every part thereof as desired.

In testimony whereof, I have hereunto set my hand and affixed the official seal of said Court at Detroit, in said District, this Second day of April, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the United States of America the one hundred and forty-second.

[SEAL.] ELMER W. VOORHEIS, *Clerk.*

69 Proceedings in the United States Circuit Court of Appeals for the Sixth Circuit.

Appearance.

Filed April 9, 1918.

William C. Cochran, Clerk of said Court:

Please enter my appearance as Counsel for Plaintiff in Error.
THOMAS A. E. WEADOCK, *Detroit.*

Entry—Cause Argued in Part.

June 10, 1918.

Before Warrington, Knappen, and Denison, JJ.

This cause is argued by Mr. Thomas A. E. Weadock for the Plaintiff in Error and by Mr. Edward S. Clark for the Defendant in Error and is continued until tomorrow for further argument.

Entry—Cause Submitted.

June 11, 1918.

Before Warrington, Knappen, and Denison, JJ.

This cause is further argued by Mr. Thomas A. E. Weadock for the Plaintiff in Error and is submitted to the Court.

Opinion.

Filed June 29, 1918.

70 Filed Jun- 29, 1918. Wm. C. Cochran, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 3179.

FRANK P. CHESBROUGH, Plaintiff in Error,

vs.

EVA A. WOODWORTH et al., Defendants in Error.

Error to the District Court of the United States for the Eastern District of Michigan, Northern Division.

Submitted June 11, 1918; Decided June 29, 1918.

Before Warrington, Knappen and Denison, Circuit Judges.

Per Curiam:

Three cases, substantially similar to Woodworth v. Chesbrough (195 Fed. 875; 221 Fed., 912; 244 U. S., 73), were consolidated in the court below, and it was stipulated that they should abide the event of Woodworth v. Chesbrough, and that in the event of the final success of plaintiff in that action, each of these three plaintiffs should have judgment for a specified fractional part of the final judgment therein. From a judgment entered in the consolidated cause, in purported pursuance of this stipulation, this writ of error is brought.

Chesbrough's substantial contention is that the final judgment actually rendered in the test case was at variance with the principle announced by the Supreme Court, and that the stipulation in
71 the consolidated cause should be interpreted by this principle without regard to the figures which erroneously entered into the judgment. This contention rests on a misapprehension. The Supreme Court said, in reciting the proceedings below, that the judgment was "for the amounts plaintiff had paid for his stock,

less its then book value, after deducting its pro rata share of the actual loss," then existing and known to defendants, on account of certain worthless commercial paper. This mention of the book value of the stock credited against the amount of plaintiff's claim was an accurate reference to what was actually done by the jury on both trials, and approved by this court and the Supreme Court, in the course of reaching the verdict which was embodied in the final judgment. Plaintiff was thought entitled to recover what he had invested in reliance upon defendant's representations, less the value of what he got; and what he did get was to be fairly measured by the then book value of this stock, as corrected by deducting the loss which ought to have been written off the books before that time. It is clear that this credit for that book value of the stock to which the Supreme Court refers was given to Chesbrough in the judgment in the other case and in the judgment in this consolidated case; and his present effort is to get the same credit over again,—including the additional book value that developed after the cause of action accrued and before plaintiffs sold their stock.

One question of jurisdiction exists: One of the plaintiffs in the consolidated cause, Miss Smalley, purchased 10 shares of stock for $1,450. She began suit in a state court, alleging this purchase, that the stock was worthless and that her damage was $3,000. The defendant, Chesbrough, in 1909, removed the case to the court below under a petition alleging that the amount in controversy was more that $2,000, exclusive of interest and costs. Thereafter, the case stood awaiting trial or awaiting judgment under the stipulation, until October, 1917, when the judgment now under review was entered. The suggestion is first made in this court that the pleadings at the time of removal demonstrated that the jurisdictional amount (then $2,000, exclusive of interest), was not in controversy.

We assume, without deciding, that the question is the same as if there had never been any consolidation, and that the de-
72 fendant Chesbrough may somehow escape the effect of the facts that both parties by their respective pleadings agreed that the amount in controversy was more than $2,000, and that by this agreement, defendant has obtained 8 years' delay. It at least must be true in that situation that the case will not now be remanded unless it is certain that the maximum limit of possible recovery at the date of commencing suit and under any theory which plaintiff might have fairly entertained, was less than the jurisdictional amount. This is not certain. If the defendants' statements had been true, the stock might well have been worth considerably more than the apparent book value; and if it was in truth worthless as alleged, plaintiff might reasonably have believed herself entitled to recover this maximum worth. The action was one of tort, and the jury might have allowed her an annual percentage, not as collateral interest, but as an element in giving her entire compensation for her loss. Damages of that kind, although computed at a percentage rate and equivalent to contract interest, would not be that "interest" which the jurisdictional statute (then Sec. 1 of Act of

March 3, 1887; now Sec. 24 Judicial Code) says must be excluded (Brown v. Webster, 156 U. S., 328, 329.) Thus defined and estimated, the damages might have exceeded $2,000 when the suit was commenced.

The judgment below must be affirmed.

73 *Judgment Entry.*

June 29th, 1918.

Error to the District Court of the United States for the Eastern District of Michigan.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court, in this cause be and the same is hereby affirmed with costs.

Petition for Writ of Error.

Filed July 20, 1918.

Your petitioner, Frank P. Chesbrough, plaintiff in error, in above entitled cause, respectfully shows, that the above entitled cause is now pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on the 29th day of June, affirming a judgment of the District Court of the United States, for the Eastern District of Michigan, Northern Division, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in any wise
74 upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; and therefore your petitioner would respectfully pray that a writ of error be allowed him in the above entitled cause, directing the clerk of the United States Circuit Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

FRANK P. CHESBROUGH,
Plaintiff in Error.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff giving bond according to law, in the sum of Nine Thousand Dollars.

J. W. WARRINGTON,
July 20, 1918. *Circuit Judge.*

75 STATE OF MICHIGAN,
Wayne County, ss:

Frank P. Chesbrough, of Grosse Pointe Farms, in said county and state, being duly sworn, upon his oath says, that he is the above named plaintiff in error; that the questions presented by the record in these causes, arise out of the National Banking Laws of the United States, and involve a sum which exceeds five thousand dollars, exclusive of interest and costs.

FRANK P. CHESBROUGH.

Subscribed and sworn to before me, this 11th day of July, A. D. 1918.

SARA G. FINLEY,
Notary Public, Wayne County, Michigan.

My Commission expires Feb. 18th, 1922.

Assignment of Errors.

Filed July 20, 1918.

Now comes Frank P. Chesbrough, plaintiff in error, by Thomas A. E. Weadock, his attorney, and says, that in the record and proceedings aforesaid of said United States Circuit Court of Appeals, for the Sixth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this to-wit:

First. Said Circuit Court of Appeals erred in entering a judgment affirming the judgment of the district court of the United
76 States for the Eastern District of Michigan, northern division, in favor of said—

(A) Mary L. Hotchkiss for the sum of $3,079.90,
(B) Eva A. Woodworth for the sum of $2,463.92,
(C) Margaret A. Smalley for the sum of $1,231.96,

each as of October 2nd, 1917. Said judgments being against said plaintiff in error for the above mentioned sums respectively, with costs of suit.

Second. Said Circuit Court of Appeals erred in not reversing said judgment of the United States District Court aforesaid, and in not remanding said cause to said district court for a new trial thereof, or correcting said judgment in accordance with the opinion of this court in the case of Frank P. Chesbrough, plaintiff in error, vs. Frank T. Woodworth, defendant in error, being case No. 179 of the

October Term of the Supreme Court of the United States, for the year 1916, reported in the United States reports, volume 244, at page 173, et seq.

Third. Said Circuit Court of Appeals erred in its interpretation of the opinion of the Supreme Court of the United States in the above mentioned case.

Fourth. Said Circuit Court of Appeals erred in determining that the plaintiff in error, Frank P. Chesbrough had been allowed
77 the book value of the stock of the Old Second National Bank, in the verdict rendered by the jury in the said cause of Frank T. Woodworth vs. Frank P. Chesbrough, and also that the book value of said stock, in like manner, had been allowed in the judgments in this case.

Fifth. Said Circuit Court of Appeals erred in holding that the plaintiff in error was making an effort in these cases to get the same credit over again; namely, the book value of said stock.

Sixth. Said Circuit Court of Appeals erred in the rule for the measure of damages applied by it in this case.

Seventh. Said Circuit Court of Appeals erred in its construction of the stipulation filed in this cause, and especially in its construction of said stipulation as to the meaning of the term "final result."

Eighth. Said Circuit Court of Appeals erred in affirming that portion of the charge of the district court in the case of Frank T. Woodworth vs. Frank P. Chesbrough, as to the amount of plaintiff's recovery, which portion of said charge is fully set forth in the record herein.

Ninth. Said Circuit Court of Appeals erred in not modify-
78 ing the judgment of said district court, in accordance with the opinion of this court, above referred to.

Wherefore, the said Frank P. Chesbrough, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiff in error, the said judgment of the United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Michigan, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

THOMAS A. E. WEADOCK,
Attorney for Plaintiff in Error.

Detroit, July 15th, 1918.

Appeal Bond.

Filed July 20, 1918.

Know All Men by These Presents, that Frank P. Chesbrough, *of* Grosse Pointe Farms, Michigan, as principal, and The United States Fidelity & Guaranty Co. of Baltimore, Maryland, a corporation, formed and existing under the laws of the state of Maryland, The

United States Fidelity & Guaranty Co., of Baltimore, Mary-
79 land as surety, are held and firmly bound unto Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley, as their interests may appear, in the full and just sum of Nine Thousand ($9,000.00) Dollars, to be paid to the said Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley aforesaid, or to their certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves and the said Frank P. Chesbrough binds his heirs, executors, and administrators, said The United States Fidelity and Guaranty Co. binds its successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated this 18th day of July, A. D. 1918.

Whereas, lately in the United States Circuit Court of Appeals for the Sixth Circuit, in a suit pending in said court between Frank P. Chesbrough, plaintiff in error, and Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley, defendants in error, a judgment was rendered against the said Frank P. Chesbrough, and the said Frank P. Chesbrough having obtained a writ of error, and filed a copy thereof in the clerk's office of said court to reverse the judg-
ment in the aforesaid suit, and a citation directed to the said
80 Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the seventh day of October next.

Now, the condition of the above obligation is such, that if the said Frank P. Chesbrough shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

FRANK P. CHESBROUGH. [L. S.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By WM. T. McBRYAN, [SEAL.]
Its Attorney in Fact.

Sealed and delivered in presence of
THOMAS A. E. WEADOCK.
GEO. E. CRUICKSHANK.

Approved by
J. W. WARRINGTON,
Circuit Judge.
July 20/18.

81 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of Appeals for the Sixth Judicial Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals

before you, or some of you, between Frank P. Chesbrough, Plaintiff in Error and Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley, Defendants in Error, a manifest error hath happened, to the great damage of the said Frank P. Chesbrough as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 23rd day of July, in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk Circuit Court of Appeals for the Sixth Circuit.

Allowed by
J. W. WARRINGTON,
Circuit Judge.

[Endorsed:] 3179. Writ of Error from U. S. Supreme Court. Filed Jul- 23, 1918. Wm. C. Cochran, Clerk.

(*Return on Writ of Error.*)

United States Circuit Court of Appeals for the Sixth Circuit.

In pursuance of the command of the within writ of error, I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do herewith transmit, under the seal of said court, a true, full and complete copy of the record and proceedings of said court in the cause and matter in said writ of error stated, together with all things concerning the same, to the Supreme Court of the United States, together with said writ of error and the citation to said defendants in error.

Witness my official signature and the seal of said Court, at Cincinnati, Ohio, in said Circuit this 13th day of August, A. D. 1918 and in the 143rd year of the Independence of the United States of America.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit,
By ARTHUR B. MUSSMAN, *Deputy.*

82 UNITED STATES OF AMERICA, *ss:*

To Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Sixth Circuit wherein Frank P. Chesbrough is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John W. Warrington United States Circuit Judge for the Sixth Circuit, this 23d day of July, in the year of our Lord one thousand nine hundred and eighteen.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

J. W. WARRINGTON,
United States Circuit Judge for the Sixth Circuit.

82½ Due personal service of the within citation is hereby acknowledged this 25th day of July A. D. 1918.

EDWARD S. CLARK,
Counsel for Defendants in Error.

[Endorsed:] No. 3179. Citation. Filed Aug. 12, 1918. Wm. C. Cochran, Clerk.

83 United States Circuit Court of Appeals for the Sixth Circuit.

I, William C. Cochran, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the case of Frank P. Chesbrough vs. Mary L. Hotchkiss, Eva A. Woodworth and Margaret A. Smalley No. 3179, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth

Circuit, and of the whole thereof, together with the original writ of error and citation.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 13th day of August, A. D. 1918.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

WILLIAM C. COCHRAN,
Clerk of the United States Circuit Court
of Appeals for the Sixth Circuit,
By ARTHUR B. MUSSMAN, *Deputy.*

Endorsed on cover: File No. 26,749. U. S. Circuit Court Appeals, 6th Circuit. Term No. 663. Frank P. Chesbrough, Plaintiff in Error, vs. Mary L. Hotchkiss, Eva A. Woodworth, and Margaret A. Smalley. Filed September 16th, 1918. File No. 26,749.

SUPREME COURT OF THE UNITED STATES

October Term, A. D., 1919.

No. 206.

Frank P. Chesbrough, *Plaintiff in Error,* v. Eva A. Woodworth, Mary L. Hotchkiss, and Margaret A. Smalley, *Defendants in Error.*	Error to the U. S. Circuit Court of Appeals for the Sixth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

Plaintiff in error, who was defendant below, seeks a review of the judgment of the U. S. Court of Appeals for the Sixth Circuit, in affirming a judgment of the District Court for the Eastern District of Michigan, being three suits, consolidated, and growing out of the same transaction as the case of *Chesbrough v. Woodworth, 244 U. S., 72.*

The defendants in error, being respectively the wife, and two sisters-in-law of Frank T. Woodworth, brought suits sev-

erally against Frank P. Chesbrough and Jos. Wm. McGraw, for causes of action similar to the case of *Frank T. Woodworth v. same defendants,* decided in this Court, May 21, 1917, *244 U. S., 72.* The cases were brought under R. S., Sec. 5239, for damages on purchases of stock of the Old Second National Bank of Bay City, made by Frank T. Woodworth, as agent for these plaintiffs below.

The cases were consolidated, May 28, 1912, on motion of plaintiffs (R., 33). McGraw died insolvent, Sept. 4, 1914, and, on Oct. 2, 1917, suit was discontinued against him (R., 33). Defendant Chesbrough having paid the Woodworth judgment, Oct. 2, 1917, the consolidated causes came on to be heard without a jury (R., 34), and counsel for plaintiff moved for judgment on the stipulation of May 24, 1913 (R., 34).

Pending the settlement of the bill of exceptions in the *Woodworth* case, which took some time, as the record was long, the case now before the Court was pressed for trial at the May term, 1913, by plaintiff (May and October terms, each year, are held at Bay City), and defendant Chesbrough was compelled to enter into the stipulation herein (R., 39; 2nd Finding).

The Stipulation Provided.

> "1. That the above entitled causes shall, in all respects and as to all parties therein, be governed and concluded by the final result in the said case of Frank T. Woodworth, plaintiff, against Joseph W. McGraw and Frank P. Chesbrough" (R., 34).

The difference between counsel in this matter was the construction of the stipulation above quoted, and resulting from that, a difference as to the amount of the judgments. Defendant's contention was that the Supreme Court of the United States did not affirm the judgment of the District Court, rendered November 22nd, 1913, for $23,714; that judgment was reversed and a new trial granted, unless the

plaintiff in that case would remit the sum of $7,708.56, and if he did so remit, and filed a certified copy of the remittitur in the Circuit Court of Appeals, then the judgment would be affirmed at the sum of $16,005.44. Plaintiff did remit this sum on May 7th, 1915, whereupon the judgment in the reduced amount was affirmed by the Court of Appeals, on the eleventh day of May, 1915.

Plaintiff then took out a cross writ of error, seeking to reverse this action of the Court of Appeals, and its judgment was affirmed by this Court.

Woodworth v. Chesbrough, 244 U. S., 79.

Owing to the insolvency of defendant McGraw, the entire burden of the loss has fallen upon Chesbrough alone (R., 35).

The statement in the opinion of this Court, 4th paragraph, on page 75, *244 U. S.*, in reference to the bank, "Its total loans and discounts were about $100,000," was probably an oversight.

As a matter of fact the loans and discounts of the Old Second National Bank, as appeared on page 2 of the record in that case, was $1,063,463.44.

The matter of the deduction on allowance of the book value of the stock retained by plaintiffs below, may have occurred in the same way.

Defendant Chesbrough contended in the trial court, and in the Court of Appeals, that the jury did *not* allow the book value of the stock, either in the first or second trial, and the trial court refused to permit defendant to prove the value of the stock. The jury, in the last trial, followed exactly the District Court's statement of the items of damage in the charge, and gave a verdict for just the amount he indicated, with a few dollars over.

The court said (R., 36):

> "If you find that plaintiff is correct in these claims and in the amount claimed, the measure of his damages would be as follows: For his first purchase, which was a purchase of 20 shares, or one per cent of the capital stock of the bank, his damages would be one per cent of the $200,000, or $2,000 with interest, from March 14th, 1903, to the date of your verdict, at five per cent, which is claimed to be $975.56, making a total claim for his first purchase of $2,975.56. For his second purchase, which was a purchase of 25 shares, or 1¼ per cent of the capital stock of the bank, he would be entitled to recover 1¼ per cent of $200,000.00, or $2,500.00, together with interest at five per cent, from May 26th, 1903, to the date of your verdict, which is claimed to be $1,194.45, making a total claim for the second purchase of $3,694.45. For the third purchase, which was a purchase of thirty shares, or 1½ per cent of the capital stock of the bank, he would be entitled to recover 1½ per cent of $200,000.00, or $3,000.00, together with interest at five per cent, from September 16th, 1903, which is claimed to be the sum of $1,387.50, making a total claim for the third purchase of $4,387.50. For the fourth purchase, which was a purchase of eighty shares, or four per cent of the capital stock of the bank, his damages would be four per cent of $200,000, or $8,000, with interest at five per cent, from December 16th, 1903, which is claimed to amount to $3,600, making a claimed total for the fourth purchase of $11,600. The total sum so claimed would, therefore, be as follows: For the first purchase, with interest, $2,975.56; for the second purchase, with interest, $3,694.45; for the third purchase, with interest, $4,387.50; for the fourth purchase, with interest, $11,600, making the total amount, with interest, $22,657.51."

The verdict was $22,662.98, so the jury did not allow a cent for the value of the stock, and the trial court so found (R., 40). March 23, 1905, Frank Woodworth sold five shares of his

stock, which had been reduced to 2½ shares, at $75 a share, to Martin M. Andrews, and in the latter part of October, 1911, he sold the balance of his stock at $105 a share, which would prove that his stock was worth $52.50 per share, and that element has been entirely ignored in making up the amount of these judgments.

These plaintiffs, defendants in error here, sold their stock. Eva A. Woodworth sold 10 shares, to which her 20 shares had been reduced, on October 16th, 1911, to James E. Davidson, president of the Old Second National Bank, and to Mrs. Elizabeth Foss, wife of E. B. Foss, a director of same bank, one-half to each, the price received by them was $105 per share. Margaret A. Smalley sold her shares, certificate number 251, 5 shares, dated March 7th, 1905, and transferred them, July 24, 1912, to R. C. Bialy, of Bay City, at the same price. Mary L. Hotchkiss sold her 12½ shares, to which her 25 shares had been reduced, on the 24th of August, 1912, to said James E. Davidson, 6 shares, and to said E. B. Foss, 6½ shares, at the same price.

So that calling attention to the motion made to correct the judgment in the case of *Woodworth v. Chesbrough and McGraw,* from $16,005.44, by deduction, of the number of shares he sold to Andrews, and interest thereon, for the 8 years, 8 months, 29 days, making in all $527.45, it would leave the proper amount of the Woodworth judgment at $15,467.99, which, with interest at 5 per cent to October 2, 1917, from November 22nd, 1913, the date of the judgment, 3 years, 10 months, 10 days, would equal $3,110.89, making in all $18,578.88, and not $19,095.38. The result of this would be that under the stipulation the claim of Mary L. Hotchkiss, for 25 shares, which would be 1/6 of the Frank T. Woodworth stock, would be $2,578, less the book value of the stock at $75 per share, $1,875, leaving a balance of $703, upon which there would be interest for 3 years, 10 months and 10 days at 5 per cent, amounting to $106.03, leaving the amount she ought to receive a judgment for, as $809.03. In the case of Eva A. Woodworth, she would get 4/5 of that amount, or 20 shares, which would amount, by the same process, to a judgment in her favor for $647.20, and the

claim of Margaret A. Smalley, computed in the same way, would amount to $318.60.

If the matter is viewed in another way and on the basis of the $52.50 per share, as the book value, taking the corrected judgment at $15,467.99, Mary L. Hotchkiss' judgment would be $1,921.75, and the other computations would be made in the same way. The contention is that the book value of the stock was not allowed in any computation by the jury, and the opinion of this court, as I construe it, is that it should have been allowed.

Both reversals by the Court of Appeals were on the ground of wrong measure of damages, $223,000 being the loss claimed in the first trial; $200,000 being the basis on the second trial, which the Court of Appeals held should have been only $135,000.

The opinion of this Court, *244 U. S.*, on page 73, third paragraph, states:

> "* * * a verdict was returned and judgment rendered upon it for the amounts plaintiff had paid for his stock, less its then book value, after deducting of the actual loss written off on account of the Maltby and Brotherton paper, with interest—an average of $167 a share."
>
> *See 195 Fed. R., bottom of page 878, top of page 879.*

As stated above, on the second trial of the *Woodworth* case, in its charge to the jury (R., 36), the court stated the amounts of the various purchases of stock, with interest thereon from the stated date of each purchase, at $22,657.51. The jury, on the same day, gave a verdict for $22,662.98, for plaintiff, so they did not allow a cent for the value of the stock (R., 37).

Defendant Chesbrough, after the case was remanded to the District Court, moved that court to correct the judgment, in accordance with the opinion of this court, and his motion was denied (R., 37, third par.).

The trial court found as facts (R., 40):

> "(3) I find that the jury, in making up their verdict in case number 137 *(Frank T. Woodworth v. Frank P. Chesbrough)*, allowed no damages for anything more than plaintiff's proportion of the $200,000 claimed to have been knowingly lost upon the Maltby paper. They thus necessarily excluded from plaintiff's recovery the book value of the stock purchased, after deducting its *pro rata* share of such loss.
>
> "(4) I find that final judgment has been entered upon the verdict heretofore rendered in case number 137, *Frank T. Woodworth v. Frank P. Chesbrough.* That proceedings for the review of said judgment have been concluded, so that execution might have been issued thereon, and that by reason thereof, said judgment was paid and satisfied on October 2, 1917, on which date there was due and paid on said judgment, the sum of $19,095.38."

Notwithstanding this finding, the Court of Appeals said, in its opinion (R., 49, 1st par.):

> "This mention of the book value of the stock credited against the amount of plaintiff's claim was an accurate reference to what was actually done by the jury on both trials, and approved by this court and the Supreme Court, in the course of reaching the verdict which was embodied in the final judgment. Plaintiff was thought entitled to recover what he had invested in reliance upon defendant's representations, less the value of what he got; and what he did get was to be fairly measured by the then book value of this stock, as corrected by deducting the loss which ought to have been written off the books before that time. It is clear that this credit for that book value of the stock to which the Supreme Court refers, was given to Chesbrough in the judgment in the other case and in the judgment in this consolidated case; and his present effort is to get the same credit over again—including the additional book value that developed after the cause of action accrued and before plaintiffs sold their stock."

SPECIFICATION OF ERRORS.

The first, second and third assignments of error (R., 42) raise the question in regard to the amount of each of the three judgments, viz.: that the book value of the stock was not allowed to defendant Chesbrough, in fixing the amounts of said judgments in accordance with the opinion of this court in Frank T. Woodworth's case, and the Court of Appeals misapprehended the record before it, completely.

The fourth assignment of error is based upon the erroneous construction of the stipulation of May 24, 1913, by the Court of Appeals, as to the amount of the judgment to be rendered in each case.

The fifth assignment of error raises the question of the jurisdictional amount in controversy in each case.

The sixth assignment is general, and alleges error in the rendering of judgment for plaintiff in each case, instead of for defendant.

ARGUMENT.

I.

Jurisdiction.

Fifth Assignment.

In support of the objection to the lack of jurisdiction in each of these cases, and in the consolidated case, it is submitted that it is insufficient to *claim* a jurisdictional amount in the declaration. If that were so, any case could be brought in the United States Court by a mere pleading.

In the case of *Auer v. Lombard et al., First Circuit U. S. Appeals, 72 Fed., 209,* Judge Putnam, rendering the opinion of the court, in a banking case, said, on page 211:

> "Nor do we say that a circuit court of the United States could take jurisdiction of such a case when no single debt reaches the jurisdictional amount, or where it has no jurisdiction over the corporation involved. We only hold that on the case as made, the claims of the various complainants are several and cannot be joined to make up the required jurisdictional amount." *S. C., 19 C. C. A., 75, and note; 1 Foster, page 12, Sec. 5, 5th Ed.*

See, also:

Eberhard v. N. Mut. Life Ins. Co., 241 Fed., 353.

Take the figures used by Mr. Justice McKenna in the *Woodworth* case, $167 per share, without any deduction, and it would not give the jurisdictional amount, $2,000, in any view of the case, and yet that figure was found to be too large by the Court of Appeals, and again too large on the second trial of that case, and reduced, and that reduction affirmed by this Court.

Again, take the ten shares purchased for Miss Smalley, at $158 each, and they would not amount to $2,000, nor would the loss thereon.

And this amount was not reduced by set-off, counter-claim, or the finding of a jury.

A reasonable construction of the pleadings, assuming good faith, must show that the real controversy, exclusive of costs and interest, exceeded $2,000.

It is no answer to this to say that defendant removed the case from the state to the federal court. That removal was unopposed, and commencing the *Smalley* case in the state court at the same time the other cases were commenced in the United States Court, was an admission on the part of plaintiff that it involved less than the jurisdictional amount of two thousand dollars, and it was again admitted by counsel in his brief.

Defendant submits that these cases could not be consolidated for the purpose of giving the court jurisdiction, and the real amount being properly less than $3,000 in each case, judgment should have been rendered for defendant in all the cases.

Jurisdiction.

In *New York Life Ins. Co. v. Johnson, 255 Fed., 958,* a recent decision of the U. S. Court of Appeals, Eighth Circuit, the rule laid down by this court in the *Swann case, 111 U. S., 379,* was applied and followed, viz.:

> "On every writ of error, the first and fundamental question is that of jurisdiction, first of this court, and then of the court from which the record comes."
>
> "The question cannot be waived by consent of parties." *Minnesota v. Nor. Securities Co., 194 U. S., 48, 62.*
>
> "It is not the amount claimed in the prayer for relief which determines the jurisdiction of the court, if the unmistakable fact and legal certainly be that the plaintiff could not have had any reasonable expectation that she could recover, exclusive of interest

and costs, an amount within the jurisdiction of the court. In such a case, it is the duty of the court to dismiss it for want of jurisdiction, although the *ad damnum* clause demands judgment for a sum sufficient to confer jurisdiction on the court. *Smith v. Greenhow, 109 U. S., 669; North America, Etc. Co. v. Morrison, 178 U. S., 262, 267; Vance v. W. A. Vandercook Co., 170 U. S., 468, 472; Globe Refining Company v. Landa Cotton Oil Company, 190 U. S., 549, 447.*"

II.

The Stipulation.

"Final Result." Book Value of Stock Never Allowed to Defendants.

What was the final result of the Woodworth case?

The judgment of the District Court was reduced practically one-third by the Court of Appeals, and that judgment was affirmed by this court.

It may be urged that the "final result" was the affirmance of the second judgment of the Court of Appeals, but in affirming that, this court clearly stated that the jury had allowed the "book value" of the stock, by deducting that from the loss. This, the record showed they did not do.

The verdict was $22,662.98. Frank T. Woodworth bought 155 shares (he had sold 2½ shares as reduced, at $150.00 a share, which was evidently not considered, so that they allowed $142.21 a share on 155 shares, or $151.08 per share on 150 shares, and they allowed nothing for the stock which Woodworth retained and sold at $105.00 a share, or $52.50 on each share, as reduced by reduction of capital stock, one-half. So that in no view of the case did they allow for the value of the stock. The trial court would not allow de-

fendants to show the book value of the stock, although it incidentally appeared that it was about $157.00.

In the *Smalley* case, the purchase was 10 shares at $150 per share, $1,500.

By the verdict in the last case, following the figures given by the trial court she would recover $1,350.00. This was reduced by the costs defendants recovered in the Court of Appeals, to $1,231.96.

In conclusion, I respectfully submit that the jury did not allow defendant the book value of the stock at any time in either case, nor did the trial court make any allowance for it in the present case.

Plaintiffs could not have relied on defendant's "representations," for he made none at any time, either oral or written, and it is not claimed that he did.

The court must have meant the reports published, and these, it is conceded, were correct according to the books of the bank, but the error was in not charging off paper, which was not past due, and which the undisputed testimony showed the directors considered secured, but which the jury found nine years later, was not good.

The judgments in the present case are each a fixed proportion of the net amount paid by Chesbrough, alone, making one director, and he the one who knew least about the affairs of the bank, bear the entire burden.

In this connection, the Court of Appeals, in its first opinion, said, *195 Fed. Rep.*, on page 881:

> "In such a case as this, the making of the report, its attestation by the directors, and its publication do not constitute the underlying wrong."

Then the court goes on to say that certain paper should be charged off, and this was the duty of the board of directors, etc., etc. Yet the defendant was held liable on

account of something he could not possibly do alone, viz.: charge off paper, on the theory that he was one of the board, when the *uncontradicted testimony* in the case showed that the board considered the paper good, at the time the reports were made.

The judgments should be reversed, with costs.

Respectfully submitted,

Thomas A. E. Nesbet

Attorney for Plaintiff in Error.

26,749

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 206.

FRANK P. CHESBROUGH, PLAINTIFF IN ERROR,

vs.

MARY L. HOTCHKISS, EVA A. WOODWORTH, AND MARGARET A. SMALLEY.

BRIEF FOR DEFENDANTS IN ERROR.

Supplemental Statement of Facts.

The actions brought by Eva A. Woodworth and Mary L. Hotchkiss, were commenced in the district (then circuit) court of the United States for the eastern district of Michigan. The *Smalley* case was commenced in the state court (R., 1) and removed on the motion of the defendant (plaintiff in error) to the federal court, under a petition alleging that the amount in controversy was more than the jurisdictional sum.

The removal proceedings do not appear in the printed record, but these facts are conceded by counsel for plaintiff in error (Brief, p. 10; see also the finding of the Circuit Court of Appeals, R., 49).

Before the last trial of the *Frank T. Woodworth* case, a motion was made to consolidate these three cases with that case (R., 33). This motion was denied in part and granted in part, the three smaller cases being consolidated with each other, but not with the *Frank T. Woodworth* case (R., 33). The plaintiffs in the consolidated cases then (after the trial of the *Frank T. Woodworth* case) sought to bring these cases on for trial, and the defendant Chesbrough sought to delay their trial until the final decision in the *Frank T. Woodworth* case (R., 39-40). At the suggestion, and with the approval of the district judge (R., 40), a stipulation was made in the consolidated cases. This stipulation appears on pages 34-35 of the record. It contained not only the general provisions quoted in the brief for plaintiff in error, but also a specific agreement that when the *Frank T. Woodworth* case was finally concluded, judgments should be rendered in the three consolidated cases in amounts which were definitely fixed as certain fractions of the amount of the final recovery in the *Frank T. Woodworth* case (R., 35).

After the judgment in the *Frank T. Woodworth* case was finally affirmed and paid (R., 35, 40), plaintiff in error declined to give effect to the stipulation. A jury was waived (R., 34), and the case submitted to the District Judge. There was practically no dispute in regard to the facts. It was an undisputed fact, and so found by the trial judge (R., 39), that the purchases of stock made for the plaintiffs, respectively, were made by Frank T. Woodworth, as their agent, upon the dates and in the amounts shown in the declarations and that:

> "with the exception of these details, the cases involve precisely the same facts as the case of *Frank T. Woodworth*" (R., 39).

The decision of the District Judge upheld and gave effect to the stipulation, and three judgments were entered for the amounts claimed (R., 41). These judgments were affirmed by the Circuit Court of Appeals on a single writ of error, and are sought to be reviewed here on a single writ of error.

The primary claim of plaintiff in error in the trial court was that this court assumed that the jury in the *Frank T. Woodworth* case deducted the book value of the stock in making up their verdict, and that the jury did not actually make this deduction (R., 36). That a reduction should, therefore, be made in the amounts otherwise recoverable under the stipulation (R., 37). A secondary objection made for the first time in the Circuit Court of Appeals, but now given the primary place, is based upon an alleged lack of jurisdiction.

The ground relied on in the trial court, for the reduction of the judgments, had no connection with the reasons given by the Circuit Court of Appeals for the reduction of the judgment in the *Frank T. Woodworth* case upon either hearing. In computing the judgments in the present cases, the fractions named in the stipulation were correctly applied to the judgment in the *Frank T. Woodworth* case, as reduced by the decision of the Circuit Court of Appeals and affirmed by this court (R., 35, 40-41). The conditions of the stipulation were all fulfilled, as found by the trial judge (R., 40). The complaint of plaintiff in error is not that the amounts now claimed are not proportionate to the amount finally allowed by the Circuit Court of Appeals and by this court, in the *Frank T. Woodworth* case, but that some *further reduction* should be made because the language used by this court in affirming the judgment, is claimed to be inconsistent with its affirmance, and it is claimed that this language should overrule the decision itself.

This same theory had previously been unsuccessfully presented by plaintiff in error, both to this court, on a petition for a rehearing (R., 39), and also to the trial judge, on a

motion "to correct the judgment" in the *Frank T. Woodworth* case, by deducting the amount received by plaintiff on the sale of his stock. The latter motion, of course, does not appear in the present record, but it is referred to on pages 5 and 6 of the brief for the plaintiff in error.

The computations contained in the brief for plaintiff in error are erroneous, as is also counsel's explanation of the nature of the computation used in fixing the amount of the judgments. The sum of $19,095.38 represented the amount actually due on October 2, 1917, on the *Frank T. Woodworth* judgment, exclusive of costs (R., 35, 40). By the stipulation (R., 35), the judgments in the present cases were fixed at 5/31, 4/31 and 2/31 of this sum. Many of the statements found in the brief for plaintiff in error (especially those on pages 12 and 13) are so plainly erroneous that they do not need specific correction.

ARGUMENT.

I. Jurisdiction.

(Plaintiff's brief, pages 9-11.)

The cases were commenced in 1909 (R., 1, 12, 22), and jurisdiction is to be tested by the requirements of the statute at that time.

Springstead v. Bank, 231 U. S., 541.

In the *Eva A. Woodworth* and *Hotchkiss* cases, the judgments exceeded the required amount ($2,000; R., 40).

In the *Smalley* case, the judgment was for $1,231.96 (R., 40).

To save controversy over the question of jurisdiction, we originally commenced the *Smalley* case in the state court, although the other two cases were commenced in the federal court. Defendant (plaintiff in error) removed the *Smalley* case to the Federal court and we permitted it to remain there. We now think that the court had jurisdiction.

The *ad damnum* clause of the Smalley declaration claimed $3,000 (R., 9).

It is well settled that plaintiff's allegations of value govern in determining the jurisdiction, except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount. Also, that this rule controls, even when the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount.

Smithers v. Smith, 204 U. S., 632 (642).
Schunk v. Moline Co., 147 U. S., 500.

In a case of this kind the element of interest which enters into the final judgment is not to be excluded in computing the jurisdictional amount.

Brown v. Webster, 156 U. S., 328.
Continental Casualty Co. v. Spradling (C. C. A. 4th), 170 Fed., 322.

See also:

Springstead v. Bank, 231 U. S., 541.

Under the rule of these cases, the interest calculation is merely "an instrumentality in arriving at the amount of damages to be awarded on the principal demand."

In the case at bar (the *Smalley* case), the declaration showed that Miss Smalley paid for her stock, $1,450, on December 16, 1903, and that the stock was "in fact of no value" (R., 9). The suit was removed (and for the purposes of jurisdiction commenced) on May 4, 1909 (R., 1). Upon the face of this declaration, it was "legally possible" for plaintiff to recover the jurisdictional amount, upon any one of three theories:

(a) The full value of the stock, as represented by defendant.

This is the theory upon which the Circuit Court of Appeals affirmed the present judgment. Defendant's representations consisted of the published report set forth in plaintiff's declaration, and found on page 3 of the record. This report showed an unimpaired capital of $200,000, a surplus fund of $75,000, and undivided profits of $40,733.26, making the total, $315,733.26, or a book value per share, of $157.86. Plaintiff's ten shares, if defendant's representations had been true, would therefore have been worth at least $1,578.66.

There is authority in support of the rule that in a case like this the measure of plaintiff's damages is not the difference between the price paid and the actual value of the property, but is the difference between the:

> "actual value of the property at the time of the purchase and its value if the property had been what it was represented or warranted to be."
> *Morse v. Hutchings, 102 Mass., 439.*

Many cases supporting this rule are cited in:

> *4 Sutherland on Damages, 4th Ed., Sec. 1171, page 4391, note.*

As shown in the note referred to, other courts have held that there is "much soundness in the reasoning in *Morse v. Hutchings.*" Plaintiff could, therefore, claim in good faith, that her damages should be computed by starting with the sum of $1,578.66, as of December 16, 1903. This method of computation would have made the sum due exceed $2,000, on May 4, 1909, when the case was removed.

(b) Amount due at the time of trial.

Under the rule that an interest calculation is to be included when it is merely "an instrumentality in arriving at the amount of damages to be awarded on the principal demand," there is no logical reason for ending such a calculation at the date of the commencement of the suit. The matter in dispute is the amount which may be finally given by the jury, and the jury's verdict (although it may use an interest calculation as an "instrumentality") does not separate interest from principal, or make any distinction between the amount due at the time of the commencement of suit and the amount due at the date of the verdict.

Where an interest calculation is used by the jury in their discretion in computing damages in an action of tort, the calculation is necessarily carried to the date of the trial and verdict.

See:

White v. U. S. (C. C. A. 5th Cir.), 202 Fed., 501 (502).

The opinion of the Circuit Court of Appeals, on the first hearing of the *Frank T. Woodworth* case, stated that plaintiff was entitled to interest "from the date of his purchase to the date of the verdict."

Chesbrough v. Woodworth, 195 Fed., 875 (887).

To hold that the "matter in dispute" was anything less than the sum recoverable at the date of the trial, would be as illogical as to hold that the matter in dispute in an action for personal injuries could be determined only by excluding such part of the verdict as might be based upon the future disability of the plaintiff.

In *Brown v. Webster (supra), 156 U. S., 328,* the entire sum recovered was only $2,030. The purchase price of the land was $1,200. It is hardly possible, that the interest which had accrued since the commencement of suit did not exceed $30.

In *Springstead v. Bank (supra), 231 U. S., 541,* the item which was used to make up the jurisdictional amount was an attorney fee which was not payable, except "in the event of suit." This fee, therefore, accrued after suit was brought, and, at the time of commencing suit, the jurisdictional amount was not due. The court, nevertheless, held that the amount "in controversy" included the attorney fee, because:

> "the moment suit was brought the liability to pay the fee became a 'matter in controversy' and as such, to be computed in making up the requisite jurisdictional amount."

The same is true in our case, in respect to such part of the damages claimed as might accrue between the time of commencing suit and the time of trial.

It follows that the matter in dispute in the *Smalley* case, even if it is to be computed upon the basis of the loss of $1,450 and interest, was the amount of damages computed upon this basis, to the time of the trial and judgment in 1917. Upon this theory, the matter in dispute exceeded $2,400.

Making the computation in another way, the total Maltby and Brotherton loss amounted to $272,809.13. The Circuit Court of Appeals limited recovery to plaintiff's proportion of the sum of $135,000. On the $135,000 basis, the verdict amounted to $1,231.96. If, therefore, the jury had found upon competent evidence, that defendant knew that all of the Maltby and Brotherton paper was bad, a verdict could have been rendered in the *Smalley* case for more than $2,400 without any change in the theory of damages finally approved.

(c) Possible statutory liability to third persons.

Under plaintiff's allegation that the stock was actually of no value, a showing would have been possible that the Maltby and Brotherton losses were so great as to subject plaintiff not only to the loss of the sum paid, but also to the statutory personal liability, equal to the par value of her stock. In that case, such liability would have been the direct result of defendant's violation of the statute, and would have been "sustained in consequence of such violation."

Plaintiff's liability to third persons was considered a proper element of damages in a case where plaintiff was induced by the fraud of defendant to purchase an interest in a partnership.

Richards v. Todd, 127 Mass., 167 (173).

Upon the face of plaintiff's pleadings, therefore, it was "legally possible" for her to recover $2,450 ($1,450, plus $1,000), without the use of any interest calculation in making up the amount due.

II. The Stipulation.

(Plaintiff's brief, pages 2-7, and 11-13).

On pages 2-3 of plaintiff's brief, counsel seems to make some distinction between the affirmance by this court of the judgment of the district court, and its affirmance of the judgment of the Circuit Court of Appeals, which had modified, before affirming, the judgment of the district court. We do not understand why the distinction is of any importance. The modified judgment was finally affirmed by both courts. The stipulation provided that when judgment was entered upon any verdict, and when proceedings for its review were:

> "concluded or abandoned, so that execution may be issued thereon, then judgment shall be forthwith entered and execution issued * * * in favor of Mary L. Hotchkiss in an amount equal to 5/31 of the amount then due, with accrued interest, upon the judgment in said case number 137," etc. (R., 34-35).

This language is plain and there is no room for any discussion or speculation in regard to the reasoning of this court, which resulted in the affirmance of the judgment. Plaintiff in error had had his opportunity to present his views to this court, and had done so, by petition for rehearing (R., 39), as well as upon the original hearing of the case. The conditions specified in the stipulation existed, and the only thing to do was to give effect to the stipulation by taking the proper fraction of the judgment in the Frank T. Woodworth case in each of the other cases and entering judgment for that amount.

It is, of course, self-evident that what any one of the plaintiffs received for his or her stock, when sold, is entirely immaterial. This subject was discussed on the first hearing of the *Frank T. Woodworth* case in the Circuit Court of Appeals. That court said:

> "True, he has the stock, and though it has not paid dividends, it has appreciated in value more than interest on its face; but if it had been of the value indicated by the reports, it would also (probably) have appreciated or paid dividends. Plaintiff has that stock value which he did get, and the appurtenant gain; and for that further stock value, if any, of which he was wrongfully deprived, he should have damages and the appurtenant interest" *(195 Fed., 887)*.

It is so plain that the measure of damages approved by this court, and finally adopted, included nothing more than:

> "that further stock value of which plaintiff was wrongfully deprived,"

that any further elaboration of that idea seems useless. The trial judge made the following finding:

> "I find that the jury, in making up their verdict in case number 137, allowed no damages for anything more than plaintiff's proportion of the $200,000 claimed to have been knowingly lost upon the Maltby paper. They thus necessarily excluded from plaintiff's recovery, the book value of the stock purchased, after deducting its *pro rata* share of such loss" (R., 40).

This quotation contradicts counsel's statement (brief of plaintiff in error, p. 4) that "the jury did not allow (to plaintiff in error) a cent for the value of the stock, and the trial court so found." In fact, he found the opposite. By excluding this value from plaintiff's recovery, the jury necessarily "allowed" it to defendant. The quotations from the findings of the trial judge and the opinion of the Circuit Court of Appeals, found on page 7 of counsel's brief, are perfectly consistent with each other and with the opinion of this court.

Counsel has entirely misconstrued the opinion of this court. The paragraph to which he refers is as follows (the words upon which he apparently relies being italicized):

> "The case went to trial to a jury. Certain counts were withdrawn, and upon those submitted, *a verdict was returned and judgment entered upon it for the amounts plaintiff had paid for his stock, less its then book value,* after deducting its pro rata share of the actual loss written off on account of the Maltby and Brotherton paper with interest—an average total of $167 per share" *(244 U. S., 76).*

The court were here referring to the first trial of the case. This is shown not only by the context, but also by the reference to the Brotherton paper, which was included in the judgment only on the first trial. The court were not attempting to do anything more than give a recital of the theory upon which damages were assessed at the first trial. This recital is approximately correct.

The following analysis shows the elements which were finally included in, or excluded from, the judgment:

The book value of the stock when purchased May 26, 1903, was, per share	$157.16
Plaintiff (Frank T. Woodworth) paid	158.00

This was made up of the following elements:

Brotherton loss $46,809.13 for 2,000 shares. For one share	$ 23.40
Part of Maltby loss, for which recovery was finally permitted, viz.: $135,000 for 2,000 shares. For one share	67.50
Part of Maltby loss, for which recovery was finally not permitted, viz.: $226,000, less $135,000 or $91,000 for $2,000 shares. Per share	45.50
The remainder represents the actual book value for which plaintiff did not recover, but which was deducted from his recovery, together with the Brotherton loss, and $91,000 of the Maltby loss	20.76
	$157.16
Premium paid by plaintiff	.84
	$158.00

Of all of the above amounts, only the second item of $67.50 per share (with interest) was included in plaintiff's final recovery, all the rest, including the real book value, being deducted from the price which he paid before his damages were computed.

The real book value of $20.76 was doubled when the number of shares was cut in half, making a book value of $41.52 per share. What plaintiff got when he sold his stock was somewhat more than this, due to the accumulation of earnings and the purchaser's desire to get the stock so as to qualify as a director. This had nothing to do with the merits of the litigation.

The difference between the book value shown above, as $20.76, and the book value used on the first trial ($22.26), is due to the fact that the total Maltby loss was not known at that time. It was computed at $223,000, instead of $226,000.

The following is the language of this court, interpreted by the above figures:

"A verdict was returned and judgment entered upon it for the amount plaintiff had paid for his stock		$158.00
Less its then book value	$157.16	
After deducting its pro rata share of the actual loss written off on account of the Maltby and Brotherton paper	136.40	20.76
		$137.24
With interest (about)		29.76
An average total of		$167.00"

This amount was finally reduced by the judgment of the Circuit Court of Appeals, affirmed by this court, to $67.50 per share (with interest) by the elimination of the other elements shown above.

The language of this court was therefore correct in its description of the measure of damages used on the first trial. It has no other significance whatever. The measure of damages used on the second trial was, of course, entirely different, being the plaintiff's proportion of so much of the Maltby loss as should have been anticipated by the defendants. There is nothing in the opinion of this court to indicate that any different rule should have been applied than that finally used.

III. Questions of Practice.

The section under which the cases were consolidated is Section 921 of the Revised Statutes. Proper practice required the entry of three separate judgments.

> *Mutual Life Ins. Co. v. Hillmon, 145 U. S., 285* (292).

These three judgments were removed from the District Court to the Circuit Court of Appeals by a single writ of error. This is erroneous, although the irregularity may be waived.

> *Brown v. Spofford, 95 U. S., 474.*
> *Louisville, etc. R. Co. v. Summers (C. C. A. 6th), 125 Fed., 719 (720); 192 U. S., 607.*
> *Waters-Pierce Oil Co. v. Van Elderen, 137 Fed., 557 (562-63).*

We waived this irregularity in the Circuit Court of Appeals, hoping thereby to expedite a final decision on the merits. The same practice has been followed in this court, and the error has not been waived, unless the waiver in the Circuit Court of Appeals is effective here.

The record fairly supports the inference that the proceedings in both appellate courts have been prosecuted merely for delay. The only question which affects all three of the judgments is that which involves the meaning of the stipulation. The claims of plaintiff in error in respect to this question have not even superficial merit.

The question of jurisdiction applies to the *Smalley* case only. If the contention of plaintiff in error on this question were sustained, he would gain nothing substantial thereby. As the case was commenced in the state court, it could not be dismissed, but could merely be remanded to that court. No motion to remand has ever been made by plaintiff in

error, and he is now seeking to escape the effect of his own action in removing the case from the state court by which (in the language of the Circuit Court of Appeals) he "has obtained eight years delay." If the case were remanded the stipulation would follow the record, and would be as effective in the state court as in the district court. The judgment could not be reduced and plaintiff in error would properly be taxed with the costs of the district court, the Circuit Court of Appeals and of this court.

Postal Tel. Cable Co. v. Alabama, 155 U. S., 482.

As there is thus nothing substantial to be gained by the raising of the jurisdictional question, it is a natural inference that it is raised for the purpose of delay. We therefore ask for special damages in all three cases under subdivision 2 of Rule 23. If not allowed in the *Smalley* case, special damages should, at least, be allowed in the other two cases, which are not affected by the jurisdictional question.

Respectfully submitted,

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